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No. 10-____

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED

GENERAL ELECTRIC CO. - 871 DEC 29 2010
Petitioner,

v.

OFFICE OF THE CLERK

LISA PEREZ JACKSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a), the United States Environmental Protection Agency ("EPA") has issued over 1,700 unilateral administrative orders ("UAOs") during the last three decades to over 5,400 companies it adjudges potentially responsible parties ("PRPs"), compelling response actions costing an aggregate $5 billion, all in concededly non-emergency situations and without any pre-issuance notice or hearing. UAOs impose significant response costs on PRPs that comply. A PRP that seeks to challenge the UAO rather than comply faces the threat of treble damages and daily fines of $37,500 that accumulate pending judicial review that can be triggered only at EPA's sole discretion. As a result, any non-complying PRP is subject to significant decreases in market value and increases in financing costs. The court of appeals held that a UAO's imposition of such financial harms does not deprive PRPs of property under the Due Process Clause of the Fifth Amendment. The questions presented are:

1. Does a UAO's imposition of either significant response costs or significant decreases in a PRP's stock price and credit rating constitute a deprivation of property under the Due Process Clause?

2. Does CERCLA's UAO scheme impermissibly coerce compliance in violation of the Due Process Clause by conditioning any judicial review of a UAO upon the threat of treble damages and fines that accumulate at EPA's sole discretion?

PARTIES AND RULE 29.6 STATEMENT

Respondents, defendants below, are Lisa Perez Jackson, Administrator, United States Environmental Protection Agency, and the United States Environmental Protection Agency. The Petitioner is General Electric Company, a publicly held company. Petitioner has no parent company, and no publicly held company owns more than 10 percent of its stock.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, General Electric Co. ("GE"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the D.C. Circuit (Pet. App. 1-33a) is reported at 610 F.3d 110. The relevant opinions of the district court are reported at 362 F. Supp. 2d 327 (Pet. App. 96-126a), and 595 F. Supp. 2d 8 (Pet. App. 36-95a).

JURISDICTION

The D.C. Circuit issued its decision on June 29, 2010. Pet. App. 1a. GE's petition for rehearing and rehearing *en banc* was denied on September 30, 2010. Pet. App. 34a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution states, in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

STATUTORY PROVISION INVOLVED

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a), provides:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat . . . . The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

STATEMENT

This petition presents two issues of exceptional importance under the Due Process Clause of the Fifth

Amendment that arise from the delegation of uniquely unreviewable adjudicatory authority to an agency. The first is whether it constitutes a deprivation of property under the Due Process Clause for EPA to issue a UAO that causes a complying PRP to incur substantial response costs and a non-complying PRP to suffer a dramatic decline in stock price and credit rating pending judicial review that can be triggered, if ever, at EPA's sole discretion. The second is whether allowing a PRP to challenge such an order only upon threat of treble damages and daily fines of $37,500 that accumulate at EPA's sole discretion is impermissibly coercive in violation of the Due Process Clause.

Over the past three decades, EPA has issued over 1,700 UAOs to over 5,400 PRPs ordering total payments of response costs at CERCLA sites of over $5 billion. Pet. App. 82a; *see* United States General Accounting Office, *Superfund Program Management*, GAO/HR-97-14 at 6 (Feb. 1997), *available at* http://www.gao.gov/archive/1997/hr97014.pdf. Despite this onerous liability, only a handful of PRPs have ever sought or received independent judicial review of a UAO. That is because CERCLA imposes treble damages plus penalties of $37,500 per day for noncompliance, and EPA can and does defer judicial review for years while those potential liabilities mount. *See* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 40 C.F.R. § 19.4. Any PRP that defies a UAO in order to await a possible EPA enforcement action in which the PRP can seek to challenge the accuracy of the UAO in court faces what the district court found to be immediate and sustained damage to its stock price and credit rating, Pet. App. 70-71a, that can drive a company "out of business" or affect its "ability to bid for new

projects or to hire additional employees," Pet. App. 77a.

The UAO scheme thus gives EPA effectively unreviewable adjudicatory authority that is unique for an executive agency. That is presumably why EPA now relies virtually exclusively on UAOs when a party declines to enter into a consent decree, even though CERCLA provides EPA other alternative means of compelling response actions or contributions to cleanup costs that *are* subject to judicial review. *See* Pet. App. 3a. The D.C. Circuit avoided the serious due process questions at stake by holding as a threshold matter that the undisputed financial harms a UAO inflicts upon a business do not deprive it of "property" within the meaning of the Due Process Clause. Pet. App. 14-16a.

That ruling conflicts with this Court's decision in *Connecticut v. Doehr*, 501 U.S. 1 (1991), and creates conflict or tension with decisions of the First, Second, Third, and Ninth Circuits and the Supreme Courts of Rhode Island, Maryland, and California. The D.C. Circuit's decision separately conflicts with this Court's century-old holding in *Ex parte Young*, 209 U.S. 123, 147 (1908), that due process precludes fines "so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the[ir] validity." CERCLA's UAO scheme impermissibly requires a firm to "bet the farm by taking the violative action before testing the validity of the law." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (ellipsis and internal quotation marks omitted). By giving EPA sole control over a PRP's access to court, this scheme is even more coercive than those previously reviewed by this Court for consistency with *Ex parte Young*.

See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). This Court should grant certiorari.

A. Statutory Background

Under CERCLA, when EPA determines that an environmental cleanup is required at a contaminated site, the agency has three options. *First*, EPA may conduct the cleanup itself and file suit against a PRP in federal district court to recover the costs of the cleanup. *See* 42 U.S.C. §§ 9604(a), 9607(a), 9611(a), 9613. *Second*, EPA may file an abatement action in federal district court to compel a PRP to conduct a specified response action. *See id.* § 9606(a). *Third*, EPA may, without court involvement, issue a UAO compelling a PRP to conduct a specified response action. *See id.* As described by the district court:

> UAOs may essentially be viewed as condensed prosecutions and adjudications: they initiate adversary proceedings against a PRP, but simultaneously constitute a statement that the PRP is legally responsible for the violation and require the PRP to remedy wrongs through the fulfillment of certain responsibilities and penalties (*i.e.*, UAOs regulate conduct of PRPs).

Gen. Elec. v. Johnson, No. Civ.A.00-2855, 2006 WL 2616187 at *15 n.5 (D.D.C. Sept. 12, 2006).

Under either of the first two options, a PRP targeted by EPA has a statutory right to a meaningful hearing before a neutral decision-maker in which it can challenge both EPA's determination that the PRP is liable and EPA's selection of the response action at the site. *See* 42 U.S.C. § 9613(h). These hearings have often resulted in findings in favor of the PRP, demonstrating that EPA's determinations of CERCLA liability are fallible and cannot be assumed

to be as accurate as the miniscule rate of PRP challenges to UAOs might otherwise suggest. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1883-84 (2009) (rejecting liability determination as to one PRP and requiring apportionment of costs as to another); *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 441 (1st Cir. 1990) (Breyer, J.) (rejecting EPA remedy imposing a stricter soil standard for PCBs based on assumption that "children will eat a little bit of dirt each day for 245 days per year for three and a half years").[1]

Under the third option, by contrast, a PRP that receives a UAO has no timely right to a hearing to challenge EPA's adjudicatory determinations. Rather, as the court of appeals recognized, CERCLA's statutory structure places a PRP's right to challenge a UAO entirely in EPA's hands. Pet. App. 4-5a. CERCLA expressly bars any PRP from filing an action challenging "any order issued under [42 U.S.C.] section 9606(a)" such as a UAO. 42 U.S.C. § 9613(h); *see* Pet. App. 132-33a (discussing § 9613(h)'s effects). If a PRP receives a UAO, its sole choices are to "comply and, after completing cleanup, seek reimbursement from EPA," Pet. App. 4a (citing 42 U.S.C. § 9606(b)(2)(A)), or to "refuse to comply," Pet. App. 4a, waiting for EPA, at its sole discretion, to "bring an action in federal district court to enforce the UAO against the noncomplying PRP," Pet. App. 5a (citing 42 U.S.C. § 9606(b)(1)). A noncomplying PRP faces

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[1] *See also United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 694 (10th Cir. 1999) (finding that EPA acted arbitrarily and capriciously in modifying remedy at site); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 904-06 (5th Cir. 1993) (finding that EPA acted arbitrarily and capriciously in deciding to provide alternative water supply absent evidence of public health need).

potential treble damages and noncompliance penalties of $37,500 per day, 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 40 C.F.R. § 19.4, which accumulate until EPA, at its sole discretion, brings an action to enforce its order. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3), 9613(h). Since EPA has up to six years to bring suit, *see* 42 U.S.C. § 9613(g)(2), such fines could total over $82 million per violation, plus treble damages totaling many millions of dollars more—a disabling sum for a large company and a fatal one for a small business.

Recognizing that a UAO is effectively unreviewable, EPA has abandoned use of judicial abatement actions under CERCLA in favor of issuing UAOs to all PRPs that decline to enter into consent decrees. Pet. App. 80a; *see also* EPA, OSWER Directive No. 9833.0-1A, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions ("EPA Guidance") 3 (Mar. 7, 1990), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf ("[T]he Agency typically will compel private-party response through unilateral orders," which "should be considered as one of the primary enforcement tools to obtain RD/RA response by PRPs."). Thus, from August 16, 1982 to May 25, 2006, EPA issued over 1,700 UAOs, Pet. App. 82a, ordering private recipients to pay an aggregate $5.5 billion for response costs at CERCLA sites. Despite statutory language restricting the issuance of UAOs to situations posing "an imminent and substantial endangerment to the public health or welfare or the environment," it is undisputed that EPA does not use UAOs in cases of environmental emergency, instead conducting cleanup operations itself in such cases. Pet. App. 80a. Far from being used in urgent circumstances, UAOs generally are not issued until

years after EPA has become involved at a contaminated site. Pet. App. 81a.

Because CERCLA § 113(h) precludes any challenge to a UAO until all of the work required under the UAO has been completed or until EPA brings an enforcement action, *see* 42 U.S.C. § 9613(h), only a miniscule number of the 1,705 UAOs issued by EPA have ever been subject to independent review, and even then, only many years after issuance of the order. Pet. App. 82a, 202a. According to EPA's own internal documents, EPA trains its personnel to make the terms of UAOs "ugly, onerous, and tough," Pet. App. 198a; to make their settlement demands appear "more attractive by making the [UAO] alternatives what PRPs want least, very unpleasant," Pet. App. 198a; and to threaten potential UAO recipients in large groups of PRPs with games of "Russian Roulette," Pet. App. 198a, so as to further coerce their entry into "voluntary" decrees.

B. Proceedings Below

The district court initially dismissed GE's due process challenge to CERCLA's UAO regime as barred by 42 U.S.C. § 9613(h). Pet. App. 140a. The D.C. Circuit reinstated the suit. Pet. App. 127a. On remand, the district court issued two published opinions.

In the first, the district court rejected GE's argument that CERCLA on its face violates the Due Process Clause by authorizing EPA to issue UAOs unilaterally without notice and an opportunity for a hearing before a neutral arbiter. Pet. App. 120a. Ruling without the benefit of an evidentiary record, the district court held that the mere issuance of a UAO does not deprive a PRP of a protected property interest, Pet. App. 115a, and that the UAO scheme

does not violate *Ex parte Young* because CERCLA contains a "good faith" defense and only a judge may impose any ultimate penalties, Pet. App. 122a. While rejecting GE's facial challenge, the district court allowed discovery to proceed on GE's claim that EPA's pattern and practice in issuing UAOs unconstitutionally deprives PRPs of due process rights. Pet. App. 126a.

Over the ensuing four years, the parties engaged in substantial discovery: "The parties produced tens of thousands of documents, conducted numerous fact and expert depositions, and exchanged reports and rebuttal reports for six experts." Pet. App. 43a. In the words of the district court, "[t]he factual record in this case is now, to put it bluntly, extensive." Pet. App. 43a.

Based on this record, the district court issued a second opinion containing a series of factual findings supporting its conclusion that UAOs impose immediate and substantial costs on recipients. The district court found that, if a recipient complies with a UAO, it must perform the response actions set forth in the order and incur costs that average $4 million. Pet. App. 77a. If a recipient elects to challenge a UAO rather than comply, however, it faces contingent liability for treble damages and noncompliance penalties that accumulate at the rate of $37,500 per day, causing it immediate and significant harm in the form of reduced market value and increased costs of financing. Pet. App. 70-71a. In so finding, the district court relied on an expert econometric analysis that calculated that noncompliance with a UAO would cause a recipient, on average, an immediate $76.4 million decrease in market value and a significant increase in financing costs. Pet. App. 64a, 76a. Even

EPA's own expert did not dispute the conclusion that a recipient's failure to comply with a UAO would cause a significant decrease in stock price and increase in its cost of financing. Pet. App. 66a.

Based on these findings, the district court concluded that UAOs impose significant pre-hearing deprivations on recipients that trigger due process protection:

> [D]eprivations caused by UAOs are potentially so large—on average $4 million for complying PRPs and some substantial, unidentified amount for noncomplying PRPs—that they may have collateral effects. *UAOs could put some PRPs out of business* . . . . For other PRPs, UAOs may affect operations, like whether to bid for new projects or to hire additional employees . . . .

Pet. App. 77a. (emphasis added).[2] Adhering to this Court's opinion in *Connecticut v. Doehr*, 501 U.S. 1 (1991), the district court held that these consequences to a PRP's stock price and cost of financing, Pet. App. 70-71a, are "sufficient to merit due process protection," Pet. App. 57a.

Turning to whether the process provided to PRPs is constitutionally sufficient, the court applied the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1975), Pet. App. 59-95a, and concluded that the process afforded was adequate in light of the

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[2] The district court also reiterated its prior holding that the statutory structure does not violate *Ex parte Young*, for the same reasons it had previously given. Pet. App. 51a.

government's interest and risk of error.[3] GE timely appealed both decisions.

C. The D.C. Circuit Decision

On appeal, the Court of Appeals for the D.C. Circuit did not dispute the district court's finding that UAOs result in immediate, adverse market impacts that "are irreparable and cannot be remedied through a later, delayed challenge to [a] UAO." Pet. App. 13a. The court of appeals held, however, that such injuries are irrelevant because it first had to answer "an antecedent question: does the Due Process Clause protect PRPs' interest in the market's assessment of their stock, brand, and credit worthiness?" Pet. App. 13a.

The court of appeals answered that question in the negative, reasoning that there was "no independent source such as state law" for a PRP's interests in its market value and creditworthiness, Pet. App. 14a (quotation mark omitted), and that a PRP's "claimed injuries" are merely "consequential" because they result "from independent market reactions to the issuance of a UAO," Pet. App. 14a. The court of appeals interpreted *Doehr* as speaking only to the "*significance* of the private interests at stake" under the first *Mathews* factor—not to whether a government action triggers due process protection in the first place. Pet. App. 15a. In the court of appeals' view, "although *Doehr* does hold that direct, partial impairments of property rights may well warrant due process safeguards, nothing in the opinion implies that consequential injuries, standing alone, merit due process protection." Pet. App. 16a. For the same

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[3] Because the D.C. Circuit did not reach this question, GE does not raise it for review before this Court.

reasons, the court of appeals rejected GE's pattern and practice challenge to EPA's use of UAOs. Pet. App. 30-32a.[4]

The court of appeals also rejected GE's *Ex parte Young* challenge. The court recognized that a PRP has a protected property interest in the costs that it incurs to comply with a UAO, Pet. App. 10a, but, like the district court, found due process in the event of noncompliance satisfied by CERCLA's provision of a "good faith" defense and the fact that any noncompliance penalties are imposed by a court, not an administrative agency. Pet. App. 11-13a.

REASONS FOR GRANTING THE WRIT

I. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *DOEHR* AND THE DECISIONS OF OTHER CIRCUITS AND STATE COURTS

In *Connecticut v. Doehr*, 501 U.S. 1, 11-12 (1991), this Court held that consequential impacts from government adjudicatory action can be "significant" enough "to merit due process protection." The decision below departs from *Doehr*, holding that the indisputably significant consequential impacts a business suffers from a UAO do not trigger due process protection. Pet. App. 15-16a. The D.C. Circuit sought to justify this departure by reinterpreting *Doehr*, opining that this Court did not categorize consequential injuries as property interests but rather treated them merely as considerations going

[4] Like the district court, the court of appeals held that GE's pattern and practice challenge was not barred at the threshold by CERCLA's jurisdiction-stripping provision, § 113(h). Pet. App. 25-26a.

to the weight of the interest under the first factor in the *Mathews* balancing test. Pet. App. 15a. This new view of *Doehr* stretches beyond the CERCLA context: under the D.C. Circuit's narrow definition of "property," owners have no entitlement to due process before government adjudicatory action in any regulatory setting deprives them of market equity or the ability to secure financing necessary for its productive use.[5]

The court of appeals decision thus conflicts with *Doehr*, which held that a state statute that authorized a *non*-possessory pre-judgment attachment of real estate affected "significant" property interests, and triggered due process protection, because such an attachment "clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage." 501 U.S. at 11. This case involves just the same sorts of consequential encumbrances to property rights; UAOs impair the recipients' ability to alienate property and to secure financing in a manner analogous to government imposition of a lien or attachment. Contrary to the

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[5] The court of appeals also held that, "although a UAO may well damage the PRP's reputation," GE had not alleged a "stigma-plus" as required by *Paul v. Davis*, 424 U.S. 693 (1976). Pet. App. 16-17a. But *Paul* is inapposite, as the due process interest at stake here, as in *Doehr*, is not merely injury to a business's reputation but significant market impacts to its stock value and credit rating. That such property interests are "intangible" in no way deprives them of due process protection. *See, e.g., Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999) (patents); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 & n.9 (1984) (trade secrets); *Del., Lackawanna & W. R.R. Co. v. Pennsylvania*, 198 U.S. 341, 359 (1905) (corporate franchise).

D.C. Circuit's interpretation, Pet. App. 15a, *Doehr* found such harms to property interests "sufficient to merit due process protection" even if imposed by "the market" in response to the government action. 501 U.S. at 12.

That this is the meaning of *Doehr* is confirmed by this Court's express agreement with the Second Circuit holding under review in that case, *Doehr*, 501 U.S. at 11, that consequential market impacts arising from government adjudicatory action trigger due process protection. *See Pinsky v. Duncan*, 898 F.2d 852, 854 (2d Cir. 1990), *aff'd sub nom. Connecticut v. Doehr*, 501 U.S. 1 (1991). As the Second Circuit framed the issue: "As a threshold matter, we must determine whether the 'seizure' at issue in this case—a nonpossessory attachment of real estate—deprives the owner of a significant property interest within the meaning of the fourteenth amendment." *Id.* And, as in *Doehr*, the Second Circuit's conclusion was unambiguous:

> [A]lthough an attachment of real estate does not deprive the landowner of the use and possession of his property, and thus does not amount to a "seizure" in the literal sense, it nevertheless has a significant impact on the owner's ability to exercise the full scope of his property rights. An attachment not only impairs the *marketability* of the real estate, but also may harm the owner's *credit rating*, and may prevent him from using the property as *collateral for a loan*. Even if short-lived, these effects are certainly worthy of due process protection. . . . Consequently, we hold that a nonpossessory attachment of real estate deprives the owner of a *constitutionally*

> *protected property interest* under the fourteenth amendment.

Id. (internal citations omitted) (emphases added). Contrary to the clear language in *Doehr* and the underlying Second Circuit decision, the D.C. Circuit here concluded that "nothing in [*Doehr*] implies that consequential injuries, standing alone, merit due process protection." Pet. App. 16a (citing *Doehr*, 501 U.S. at 29 (Rehnquist, C.J., concurring in part and concurring in the judgment)). Such a narrowing of the scope of constitutionally protected property calls for this Court's review and reaffirmation of the premise of *Doehr*.

The D.C. Circuit's erroneous interpretation of *Doehr* also conflicts with the First Circuit's decision in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc). *Reardon*, the first circuit court decision to interpret *Doehr*, confronted an issue similar to that here: namely, whether CERCLA's lien procedure under 42 U.S.C. § 9607(*l*) (1991) violated due process because it did not provide for a pre-deprivation hearing. *Reardon*, 947 F.2d at 1517. In determining whether there was a "[d]eprivation" at issue so as to trigger due process protection, *Reardon* turned to this Court's guidance in *Doehr*, holding that:

> In light of these comments, we cannot but conclude that the lien on real property created in 42 U.S.C. § 9607(*l*) amounts to deprivation of a "significant property interest" within the meaning of the due process clause. The EPA's lien has substantially the same effect on the Reardons as the attachment had on the plaintiff in *Doehr*—clouding title, limiting alienability, affecting current and potential mortgages.

Id. at 1518. Thus, in square conflict with the decision below, the First Circuit read *Doehr* to hold that consequential impacts on property are property interests that "merit due process protection," *id.* (quoting *Doehr*, 501 U.S. at 12)—not merely an aspect of *Mathews*' balancing analysis.

The D.C. Circuit's decision that consequential impacts do not trigger due process is also in tension with decisions of the Second and Third Circuits. In *Ford Motor Credit Co. v. New York City Police Department*, 503 F.3d 186, 191-92 (2d Cir. 2007), the Second Circuit relied on *Doehr*'s finding that consequential injuries trigger due process protection in holding that a city's refusal to allow a lienholder to expedite and participate in a forfeiture process for automobiles used in criminal activity deprived the lienholder of property interests. Like *Reardon*, *Ford Motor Credit Co.* addressed whether such consequential impacts constitute a *deprivation* of a property interest; it did not treat them merely as a factor in the due process balance. *Id.* at 191. And, in contrast to the decision below, *Ford Motor Credit Co.* held that such consequential impacts did merit due process protection, reasoning that any government delay caused harm to the lienholder because the "property interest in the underlying asset suffers[]as the vehicle depreciates over time." *Id.* at 192.

The Third Circuit reached a similar conclusion in *Burns v. Pennsylvania Department of Correction*, 544 F.3d 279 (3rd Cir. 2009). In that case, an inmate brought a due process challenge against state corrections and prison officials who placed an assessment on the inmate's account. The defendants argued that the assessment did not result in any deprivation of property because they took no action to seize any

funds from the account. Citing *Doehr*, the Third Circuit rejected this argument, agreeing instead with the inmate's assertion that the assessment "constituted a threat of expropriation and thereby impaired his right to security in his inmate account." *Burns*, 544 F.3d at 281 n.2, 288. The Third Circuit explained that, because of the contingent liability created by the assessment, *i.e.*, the possibility of a future seizure of funds, the account "possesses a lesser present day economic value than property not so encumbered." *Id.* at 289. "As with [an] estate subject to an encumbrance, the economic value of [the inmate's] institutional account was reduced at the time of the Department of Corrections assessment and remained impaired for upwards of three years." *Id.* at 290.

To be sure, some circuits have cited *Doehr* when considering whether process has been adequate under the *Mathews* balancing test, rather than whether there has been a deprivation of property in the first place. *See, e.g.*, *Tri-State Dev., Ltd. v. Johnston*, 160 F.3d 528, 530-33 (9th Cir. 1998) (applying *Doehr* to a Washington statute "virtually indistinguishable" from the statute in *Doehr* to conclude that the Washington statute violated the plaintiff's due process rights); *Reardon*, 947 F.2d at 1517-24 (applying *Doehr* in both the first and second steps of the due process analysis).

But no decision prior to the one below had ever restricted *Doehr solely* to the question of the weight of the private interest in deciding what process is due, rather than to whether there was a deprivation of property triggering due process protections in the first place. By holding that the Due Process Clause categorically does not apply to consequential eco-

nomic harms, the decision below precludes all consideration of what process a business is due when the government takes adjudicatory action against it that is the functional equivalent of an attachment, lien, or other encumbrance.

The D.C. Circuit's holding that consequential market impacts caused by government adjudicatory action do not deprive a business of its property likewise conflicts with the holdings of several state supreme courts. For example, Rhode Island's Supreme Court has interpreted *Doehr* much as *Reardon* did, holding that, under *Doehr*, "the clouding of title[] deprived the property owner of a significant property interest." *Gem Plumbing & Heating Co. v. Rossi*, 867 A.2d 796, 807 (R.I. 2005) (quoting *Doehr*, 501 U.S. at 11).[6]

Other state supreme courts, without mentioning *Doehr*, have likewise concluded that consequential market impacts caused by government adjudicatory action merit due process protection. *See, e.g.*, *Connolly Dev., Inc. v. Superior Court*, 553 P.2d 637, 643-44 (Cal. 1976) (concluding that two separate provisions, one allowing liens and the other allowing stop-notice claims, deprived an owner of property and therefore entitled him to due process protection because, *inter alia*, lenders might refuse a loan on burdened properties or because the owner might divert funds from property improvements in order to clear his title); *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 353 A.2d 222, 228 (Md. 1976) (concluding that a lien provision will put a "cloud on the property

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[6] Like *Reardon* and *Tri-State*, *Gem Plumbing* also applied *Doehr* in the second step of the due process analysis. *See Gem Plumbing*, 867 A.2d at 809-18.

owner's title" since it will be "extremely difficult" for the owner to sell the property or to use it as equity), *superseded by statute on other grounds as stated in Winkler Constr. Co. v. Jerome*, 734 A.2d 212, 248 (Md. 1999).

The D.C. Circuit's opinion below is thus in conflict with this Court's holding in *Doehr* and the First Circuit's decision in *Reardon* and in tension with the decisions of other federal circuits and state supreme courts. This case presents an especially good vehicle for resolution of the important due process issues at stake because it involves a fully developed factual record and detailed findings by the district court on the nature and extent of the deprivation, Pet. App. 45a n.4, 77a. The parties engaged in extensive discovery, Pet. App. 43a, at considerable cost and effort that is unlikely to be replicated in a future case, *see* EPA Answering Br. 13-14, No. 09-5092 ("The effort consumed over 14,000 hours of personnel time and over $900,000 in salary costs in the first year alone."). There is thus no need to speculate about the harmful consequences of government action here, in contrast to many other cases in which due process challenges have foundered on the sparseness of the underlying records. *See, e.g.*, *Hannah v. Larche*, 363 U.S. 420, 443 (1960) (noting that any proposed harms are "purely conjectural" with "nothing in the record" to indicate that such harms will result).

II. THE D.C. CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN *EX PARTE YOUNG*

The holding of the court of appeals also conflicts with this Court's decision in *Ex parte Young*, which struck down as contrary to due process a statute that coerced compliance by threatening those who might

otherwise challenge the statute's legality with enormous penalties if their challenge proved unsuccessful. 209 U.S. at 147. The UAO scheme at issue here does likewise. Here, as in *Ex parte Young*, CERCLA imposes penalties that are "so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation." *Id.* CERCLA thus effectively denies PRPs "their due-process right to 'an opportunity to present every available defense.'" *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3-4 (2010) (opinion of Scalia, J., as Circuit Justice) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)) (granting stay).

It is no answer that CERCLA theoretically allows a PRP to elect to defy a UAO, for a PRP that pursues this "option" is subject to enormous penalties for noncompliance, including treble damages plus daily penalties of $37,500 that continue to accumulate until EPA, at its sole discretion, chooses to bring an enforcement action after a delay of up to six years. Moreover, as the district court found, a non-complying PRP suffers the impact of these extraordinary penalties immediately because the markets automatically incorporate the huge contingent liability into their present-day valuation of the firm's equity and credit rating. Pet. App. 64-65a. Thus, a non-complying PRP is faced not simply with a future threat of onerous penalties following an EPA enforcement action, but rather with a current actual sharp decrease in its market value—all without any independent pre-deprivation review. Pet. App. 63-64a.

The thirty-year history of EPA's use of UAOs makes clear how effective such a scheme is in preventing challenges to these government orders. Of the over 5,400 PRPs who received UAOs over a quarter

of a century, only a very small handful have ever elected to challenge a UAO. Pet. App. 202a.[7] "[A]ny legislative scheme that denies subjects an opportunity to seek judicial review of administrative orders except by refusing to comply, and so put themselves in immediate jeopardy of possible penalties 'so heavy as to prohibit resort to that remedy' runs afoul of the due process requirements of the Fifth and Fourteenth Amendments." *Schultz v. Internal Revenue Serv.*, 413 F.3d 297, 303 (2d Cir. 2005) (citation omitted). The fully developed factual record in this case thus demonstrates a clear violation of *Ex parte Young*.[8]

If anything, the offense to due process is greater here than in *Young* because CERCLA forces a UAO recipient to wait for the government to "take its own sweet time before suing." *Reardon*, 947 F.2d at 1519. Because a PRP cannot bring suit to challenge a UAO, but rather must wait until EPA brings suit, *see* 42 U.S.C. §§ 9606(b)(1); 9607(c)(3); 9613(h), a PRP may receive a neutral decision-maker's review of millions of dollars of contingent liability, as EPA itself has stated, only "if and when the EPA seeks to enforce the [UAO]." Brief in Opposition of EPA at 15, *Employers Insurance of Wausau v. Browner*, 516 U.S. 1042 (1996) (No. 95-434), 1995 WL 17048207.

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[7] It is also rare for a PRP that *agrees* to proceed under a UAO to violate any of the UAO's many provisions. As the district court noted below, EPA's database listed only 75 instances in which EPA has deemed a responding PRP to be out of compliance with a provision in any of the 1,700 UAOs in the agency's database. Pet. App. 73a.

[8] The CERCLA cases cited by the D.C. Circuit, none of which had the benefit of a fully developed factual record, are therefore inapposite. *See* Pet. App. 13a.

This Court should grant review to decide whether due process permits EPA thus to place UAO recipients "in limbo to await a hearing that might or might not eventually occur." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 618 (1974) (quotation marks omitted). As this Court noted in a different context last Term, "[w]e normally do not require plaintiffs to 'bet the farm by taking the violative action' before 'testing the validity of the law.'" *Free Enter. Fund*, 130 S. Ct. at 3151 (ellipsis omitted) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) and citing *Ex parte Young*, 209 U.S. 123).

A comparison with this Court's opinion in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the last decision of the Court to directly apply the portion of *Young* at issue here, is instructive. In *Thunder Basin*, the Court held that there was no *Young* violation, even though the penalties for noncompliance were "onerous," because a mine operator could obtain immediate judicial review of an order of questionable legality, 510 U.S. at 218 (citing 30 U.S.C. § 816),[9] and could obtain expedited judicial review and temporary relief from certain orders, *id.* (citing 30 U.S.C. §§ 815(b)(2), 815(d), 816(a)(2)).

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[9] Section 816 reads, in relevant part:

> Any person adversely affected or aggrieved by an order of the Commission issued under this chapter *may obtain a review of such order in any United States court of appeals for the circuit* in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, *by filing in such court within 30 days following the issuance of such order a written petition* praying that the order be modified or set aside.

30 U.S.C. § 816(a)(1) (emphasis added).

CERCLA's statutory structure could not be more different. Rather than allow a PRP to obtain immediate judicial relief by challenging the validity of a UAO, CERCLA leaves the timing of judicial review entirely in EPA's hands. *See* 42 U.S.C. § 9606(b)(1). Thus, in direct contrast to the mine operators in *Thunder Basin*, a PRP gets its day in court only if and when EPA, in its sole discretion, brings an enforcement action—a step that can take up to five years, 28 U.S.C. § 2462, and in some cases six, *see* 42 U.S.C. § 9613(g)(2). In the interim, each day that passes gives rise to a new fine of $37,500, *see* 42 U.S.C. § 9606(b)(1); 40 C.F.R. § 19.4, with the chance of treble damages, 42 U.S.C. § 9607(c)(3).[10] Thus, should EPA decide to wait the full six years before bringing an enforcement action, a PRP would be liable for over $82 million *per violation*, *id.* § 9606(b)(1), with the potential for treble damages, *id.* § 9607(c)(3)—a "bet the company" scenario even for many large businesses and a death knell for most small ones.

No other statute of which GE is aware gives the government such a modern-day Sword of Damocles. To the contrary, every other comparable scheme affords recipients of adjudicatory administrative orders either a prior hearing or a prompt opportunity for independent review after the order is issued.[11] The

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[10] EPA itself recognizes the bind a PRP faces under CERCLA's statutory structure: "Regardless of the route the Agency chooses to take upon noncompliance with a unilateral order, PRPs remain potentially liable for the response action." EPA Guidance 3.

[11] *See, e.g.*, Atomic Energy Act, 42 U.S.C. § 2168 (providing immediate judicial review of orders that "prohibit the dissemination" of sensitive information relating to nuclear weapons); Clean Air Act, 42 U.S.C. § 7603 (requiring EPA to go to

UAO scheme's abrogation of protections regularly afforded by other regulatory statutes "raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *see also id.* ("As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis.").

As the district court found below, the threat of "betting the farm" is more than illusory here: the deprivations imposed by a UAO are so large that they "could put some PRPs out of business." Pet. App. 77a. Notwithstanding this finding, the court of appeals held the imposition of treble penalties and enormous daily fines as the price of challenging a UAO unproblematic for due process purposes because any such challenge would ultimately be subject to a "sufficient cause" defense and a district court's discretion. Pet. App. 12a. The constitutional touchstone under *Ex parte Young*, however, is not the theoretical availability of some future relief from onerous penalties but the real-world, practical effect of the statu-

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court to seek extension of emergency orders beyond 60 days); Commodity Futures Trading Commission Act, 7 U.S.C. § 12a(9) (affording immediate judicial review of emergency orders relating to trading margins); Federal Aviation Act, 49 U.S.C. § 44709 (providing that orders revoking operating licenses are immediately appealable to the National Transportation Safety Board, which must dispose of any appeal within 60 days); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136d(c)(1), (3) & (4) (allowing parties subject to suspension orders to seek an immediate administrative hearing and judicial review even in cases of "imminent hazard"). Other regulatory safety schemes require government agencies to go to the courts in the first instance. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2616(a); Occupational Safety and Health Act, 29 U.S.C. § 662(a); Toxic Substances Control Act, 15 U.S.C. § 2606.

tory penalty scheme. Here that practical effect is that challenges to government action are effectively precluded, as EPA controls a PRP's access to court. *See Thunder Basin*, 510 U.S. at 218 (holding that *Ex parte Young* bars statutory schemes "in which *the practical effect* of coercive penalties for noncompliance [is] to foreclose all access to the courts" (emphasis added)).

Based on the undisputed factual record here, there can be no doubt that the CERCLA UAO scheme has a coercive "practical effect." Over the last 30 years, despite often heated disputes surrounding CERCLA liability, *see, e.g.*, Stephen Breyer, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 18-19, 39-41 (1993), and the substantial costs imposed by UAOs, very few PRPs have ever dared defy a UAO in order to challenge its validity through independent judicial review. Pet. App. 202a. The facts developed in this case thus prove the adage that judicial review is "merely nominal and illusory" where it can be obtained "only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915).

This Court thus should grant review to determine whether CERCLA violates the fundamental command that "the right to a judicial review must be substantial, adequate, and safely available." *Id.* Rather than being "safely available," judicial review of a UAO can be obtained only after an unknowable period of uncertainty during which a PRP is powerless to prevent the amassing of enormous liability while EPA "take[s] its own sweet time before suing." Thus, unlike the mining statute in *Thunder Basin*,

CERCLA violates *Young*'s prohibition on the imposition of enormous fines that effectively close off judicial review. The conflict with *Young* warrants this Court's review.

III. THE D.C. CIRCUIT'S DECISION RAISES ISSUES OF NATIONAL IMPORTANCE

The decision below has grave importance for the wide variety of business subject to CERCLA UAOs. As of 2009, EPA had nearly 4,000 sites under review for potential CERCLA action, each of which could involve multiple PRPs and UAOs. *See* EPA, Superfund National Accomplishments Summary Fiscal Year 2009, http://www.epa.gov/superfund/accomp/numbers09.html. Those sites are distinct from the approximately 500 sites that are officially designated as Superfund sites, *i.e.*, listed on the National Priorities List, which currently have construction ongoing. *See id.* As the district court observed, on average EPA issues "approximately six UAOs to nineteen PRPs every *month*," Pet. App. 82a, meaning that the EPA has and will continue to generate thousands of UAOs, affecting any PRP that falls under CERCLA's "four broad classes of PRPs," *Burlington N. & Sante Fe Ry.*, 129 S. Ct. at 1878 (noting that "[o]nce an entity is identified as a PRP, it may be compelled to clean up a contaminated area").

Moreover, while issued in the CERCLA context, the decision below also has serious implications in other regulatory contexts. Under the court of appeals's view of *Doehr*, there is no longer any due process limit to the government's ability to significantly decrease a business's stock value and credit rating through unreviewed and as a practical matter unreviewable adjudicatory action. This unchecked

government power raises issues of broad significance to the business community.

Recent economic experience starkly illustrates the error in the reasoning that market impacts resulting from adjudicative orders do not constitute deprivations of property triggering due process. After the financial shocks of late 2008, the availability of credit dropped sharply as banks tightened their lending requirements and the costs of financing increased across large sectors of the economy. As explained in a recent Congressional Oversight Panel Report:

> The credit crunch was accompanied by severe declines in numerous economic markers and widespread anxiety and uncertainty. The value of the stock market plunged 24 percent in the fall of 2008 and another 15 percent by the end of January 2009. Real GDP declined at an annual rate of 2.7 percent in the third quarter of 2008, 5.4 percent in the fourth quarter of 2008, and 6.4 percent of the first quarter of 2009.

Congressional Oversight Panel, *The Small Business Credit Crunch and the Impact of the TARP* (May 2010) at 16, *available at* http://cop.senate.gov/reports/library/report-051310-cop.cfm. These economy-wide figures reflect thousands of individual business failures, huge drawdowns on individual company's financial reserves, and dramatic declines in business investments and planned upgrades and modernizations.

As a recent analysis found, U.S. firms that faced financial constraints during the credit crunch experienced sharp declines in all areas of their business, with plans to reduce employment (by 11%), R&D spending (by 22%), capital investment (by 9%),

market expenditures (by 33%) and dividends (by 14%) in 2009. *See* Murillo Campello, et al., *The real effects of financial constraints: Evidence from a financial crisis*, 97 J. OF FIN. ECON. 470, 471 (2010). Other studies have likewise found that constraints on a company's ability to obtain financing significantly increase the probability of the company exiting the market,[12] decrease a company's investments,[13] and reduce the likelihood that a company will undertake innovative projects[14] and hire new employees.[15] Similarly, decreases in the value of a company's equity—in addition to being a direct measure of a loss of property value—also have a significant negative impact on a company's growth because of the consequent increases in the company's costs of financing.[16]

The D.C. Circuit decision artificially distinguishes between the physical attributes of property and such other important attributes of property necessary for its use and enjoyment, despite the longstanding rule that "[a]ny significant taking of property by the State

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[12] Patrick Musso & Stefano Schiavo, *The Impact of Financial Constraints on Firms Survival and Growth*, 18(2) J. EVOL. ECON. 135 (2008).

[13] Alessandro Guariglia, *Internal financial constraints, external financial constraints, and investment choices: evidence from a panel of UK firms*, 32(9) J. BANKING & FIN. 1795 (2008).

[14] Frédérique Savignac, *The impact of financial constraints on innovation: evidence from French manufacturing firms*, Cahairs de la Maison des Sciences Economiques v06042, Université Panthéon-Sorbonne (2006).

[15] Stephen Nickell & Daphne Nicolitsas, *How Does Financial Pressure Affect Firms?*, 43(8) EUR. ECON. REV. 1435 (1999).

[16] *See* Charles T. Carlstrom, *Stock Prices and Output Growth: An Examination of the Credit Channel*, Federal Reserve Bank of Cleveland, ISSN 0428-1276 (2002).

is within the purview of the Due Process Clause." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972); *see Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property." (citing *Holden v. Hardy*, 169 U.S. 366, 391 (1898))). The decision below thus leaves companies that are subject to UAOs with no meaningful right of review of government adjudicatory actions that, as the district court found in this case, "could put some PRPs out of business." Pet. App. 77a.

Beyond the UAO context, failure to consider these economic realities substantially diminishes the property rights of businesses faced with unilateral agency adjudications in the modern regulatory state. Unlike other agency actions that contain due process protections, *see, e.g.*, 5 U.S.C. §§ 553-54 (listing various due process requirements for certain agency actions such as notice and comment rulemaking or a moderately neutral decisionmaker), unilateral administrative orders invite inaccurate agency decisionmaking without any demonstrated need for foregoing due process in order to protect the public against exigent harm, *see* 42 U.S.C. § 9606(a) (allowing EPA to "issu[e] such orders as may be necessary to protect public health and welfare and the environment" without due process). The importance of this issue across a wide range of regulatory contexts underscores the need for this Court's review of the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 29, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

No. 09-5092.

GENERAL ELECTRIC COMPANY,
Appellant,

v.

LISA PEREZ JACKSON, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY AND ENVIRONMENTAL PROTECTION AGENCY,
Appellees.

Appeal from the United States District Court
for the District Columbia
(No. 1:00-cv-02855-JDB)

Argued May 18, 2010.
Decided June 29, 2010.

Before: ROGERS, TATEL, and GRIFFITH, Circuit Judges.

Opinion for the court filed by Circuit Judge TATEL.

TATEL, *Circuit Judge*: In this case, appellant challenges the constitutionality of a statutory scheme that authorizes the Environmental Protection Agency to issue orders, known as unilateral administrative orders (UAOs), directing companies and others to clean up hazardous waste for which they are

responsible. Appellant argues that the statute, as well as the way in which EPA administers it, violates the Due Process Clause because EPA issues UAOs without a hearing before a neutral decision-maker. We disagree. To the extent the UAO regime implicates constitutionally protected property interests by imposing compliance costs and threatening fines and punitive damages, it satisfies due process because UAO recipients may obtain a pre-deprivation hearing by refusing to comply and forcing EPA to sue in federal court. Appellant insists that the UAO scheme and EPA's implementation of it nonetheless violate due process because the mere issuance of a UAO can inflict immediate, serious, and irreparable damage by depressing the recipient's stock price, harming its brand value, and increasing its cost of financing. But such "consequential" injuries—injuries resulting not from EPA's issuance of the UAO, but from market reactions to it—are insufficient to merit Due Process Clause protection. We therefore affirm the district court's grant of summary judgment to EPA.

I.

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) "in response to the serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA seeks to promote prompt cleanup of hazardous waste sites and to ensure that responsible parties foot the bill. *See, e.g.*, *Gen. Elec. Co. v. Whitman* (GE I), 257 F. Supp. 2d 8, 12 (D.D.C. 2003). Although CERCLA speaks in terms of the President, the President has delegated his UAO authority to EPA, so throughout this opinion we shall refer only to EPA. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987).

Under CERCLA, EPA may itself conduct, or may order responsible parties to conduct, two types of "response actions": removal actions are short-term remedies "designed to cleanup, monitor, assess, and evaluate the release or threatened release of hazardous substances," while remedial actions are "longer-term, more permanent remedies to 'minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.'" *Gen. Elec. Co. v. EPA* (GE II), 360 F.3d 188, 189 (D.C. Cir. 2004) (per curiam) (quoting 42 U.S.C. § 9601); *see also* 42 U.S.C. § 9604 (providing authority for removal and remedial actions). CERCLA imposes strict liability on several classes of responsible parties, including current and former facility owners and operators, as well as parties that "arrange[] for" the transport, treatment, or disposal of hazardous substances. 42 U.S.C. § 9607.

When EPA determines that an environmental cleanup is necessary at a contaminated site, CERCLA gives the agency four options: (1) it may negotiate a settlement with potentially responsible parties (PRPs), *id.* § 9622; (2) it may conduct the cleanup with "Superfund" money and then seek reimbursement from PRPs by filing suit, *id.* §§ 9604(a), 9607(a)(4)(A); (3) it may file an abatement action in federal district court to compel PRPs to conduct the cleanup, *id.* § 9606; or (4) it may issue a UAO instructing PRPs to clean the site, *id.* This last option, authorized by CERCLA section 106, is the focus of this case.

To use its UAO authority, EPA must first determine "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened

release of a hazardous substance from a facility." *Id.* If EPA makes such a determination, it must then compile an administrative record and select a response action. *Id.* § 9613(k)(*l*). For remedial actions, the longer-term option, CERCLA requires EPA to "provide for the participation of interested persons, including [PRPs], in the development of the administrative record." *Id.* § 9613(k)(2)(B). Specifically, EPA must provide "[n]otice to potentially affected persons and the public," "[a] reasonable opportunity to comment and provide information regarding the [remedial] plan," "[a]n opportunity for a public meeting in the affected area," "[a] response to each of the significant comments, criticisms, and new data submitted in written or oral presentations," and "[a] statement of the basis and purpose of the selected action." *Id.*; *see also* § 9617(a)(b) (requiring public notice of all remedial actions). EPA regulations also require public notice and comment for the shorter-term removal actions. *See* 40 C.F.R. §§ 300.415(n) (requiring community notice of removal actions), 300.810-300.820 (describing contents of administrative record and mandating public comment period for remedial and removal actions).

Once EPA issues a UAO, the recipient PRP has two choices. It may comply and, after completing the cleanup, seek reimbursement from EPA. 42 U.S.C. § 9606(b)(2)(A). If EPA refuses reimbursement, the PRP may sue the agency in federal district court to recover its costs on the grounds that (1) it was not liable for the cleanup, *id.* § 9606(b)(2)(B)(C); or (2) it was liable but EPA's selected response action (or some portion thereof) was "arbitrary and capricious or . . . otherwise not in accordance with law," *id.* § 9606(b)(2)(D). Alternatively, the PRP may refuse to comply with the UAO, in which case EPA may either

bring an action in federal district court to enforce the UAO against the noncomplying PRP, *id.* § 9606(b)(1), or clean the site itself and then sue the PRP to recover its costs, *id.* § 9607(c)(3). In either proceeding, if the court concludes that the PRP "willfully" failed to comply with an order "without sufficient cause," it "may" (but need not) impose fines, *id.* § 9606(b)(1), which are currently set at $37,500 per day, *see* 73 Fed. Reg. 75,340, 75,340-46 (Dec. 11, 2008), and accumulate until EPA brings a recovery or enforcement action—a period of up to six years, *see* 28 U.S.C. § 2462 (statute of limitations for enforcement action is five years from the date a PRP violates a UAO); 42 U.S.C. § 9613(g)(2) (statute of limitations for recovery of costs is three years for a removal action and six years for a remedial action). If EPA itself undertakes the cleanup and the district court finds that the PRP "fail[ed] without sufficient cause" to comply with the UAO, the court "may" impose punitive damages of up to "three times[] the amount of any costs" the agency incurs. 42 U.S.C. § 9607(c)(3).

Central to this case, these two options—comply and seek reimbursement, or refuse to comply and wait for EPA to bring an enforcement or cost recovery action—are exclusive. CERCLA section 113(h) bars PRPs from obtaining immediate judicial review of a UAO. *Id.* § 9613(h). *See generally Reardon v. United States*, 947 F.2d 1509, 1512 (1st Cir. 1991) (en banc). That section provides that "No Federal court shall have jurisdiction . . . to review any order issued under section [106]" until the PRP completes the work and seeks reimbursement, *id.* § 9613(h)(3), or until EPA brings an enforcement action or seeks to recover fines and damages for noncompliance, *id.* § 9613(h)(1)(2).

Over the years, appellant General Electric (GE) has received at least 68 UAOs. *See Gen. Elec. Co. v. Jackson* (*GE IV*), 595 F. Supp. 2d 8, 17 (D.D.C. 2009). In addition, GE "is currently participating in response actions at 79 active CERCLA sites" where UAOs may issue, Reply Br. 22, including the cleanup of some 200 miles of the Hudson River stretching from Hudson Falls to the southern tip of Manhattan. According to EPA and its amicus, from 1947 to 1977, two GE manufacturing plants near Hudson Falls contributed to the river's pollution by discharging polychlorinated biphenyls, considered a probable human carcinogen. Nat'l Res. Def. Council et al. Amicus Br. 2 ("NRDC Amicus Br."); *see also United States v. Gen. Elec. Co.*, 460 F. Supp. 2d 395, 396 (N.D.N.Y. 2006). Although EPA has yet to issue GE a UAO for the Hudson River, the agency has reserved the right to do so, *see* NRDC Amicus Br. 7, and the company suspects it will receive UAOs at other sites as well.

In 2000, GE filed suit in the United States District Court for the District of Columbia challenging CERCLA's UAO regime. In its amended complaint, GE alleged that the statute violates the Fifth Amendment to the United States Constitution because it "deprive[s] persons of their fundamental right to liberty and property without . . . constitutionally adequate procedural safeguards." Am. Compl. ¶ 2. According to GE, "[t]he unilateral orders regime . . . imposes a classic and unconstitutional Hobson's choice": because refusing to comply "risk[s] severe punishment [i.e., fines and treble damages]," UAO recipients' only real option is to "comply . . . before having any opportunity to be heard on the legality and rationality of the underlying order." *Id.* ¶ 4. GE also alleged that it "has been and is aggrieved by CERCLA's fundamental constitutional deficiencies"

because it has repeatedly received UAOs and is likely to receive them in the future. *Id.* ¶ 7; *see also id.* ¶¶ 31-47. GE sought "[a] declaratory judgment that the provisions of CERCLA relating to unilateral administrative orders . . . are unconstitutional." *Id.* Prayer for Relief ¶ 1.

The district court dismissed GE's amended complaint for lack of jurisdiction. According to the district court, section 113(h) prohibits "broad, pre-enforcement due process challenge[s] to the statute . . . until EPA seeks enforcement or remediation is complete" on a particular UAO. *GE I*, 257 F. Supp. 2d at 31. We reversed, ruling that section 113(h) presented no bar to GE's lawsuit because the company "does not challenge any particular action or order by EPA." *GE II*, 360 F.3d at 191.

On remand, the district court issued two decisions that GE now appeals. In the first, issued in 2005, the district court granted EPA's motion for summary judgment on GE's facial due process challenge. *Gen. Elec. Co. v. Johnson* (*GE III*), 362 F. Supp. 2d 327 (D.D.C. 2005). The district court held that the statute provides constitutionally sufficient process because by refusing to comply with a UAO, a PRP can force EPA to bring a court action in which the PRP can challenge the order. The court also rejected GE's claim that CERCLA's fines and treble damages are so severe that, as a practical matter, they foreclose judicial review. In the alternative, the district court applied the "*Salerno* doctrine," which prohibits facial invalidation of a statute unless the statute "is unconstitutional in every application." *Id.* at 343; *see United States v. Salerno*, 481 U.S. 739, 745 (1987). According to the court, even if CERCLA's fines and damages make pre-compliance review unavailable as

a practical matter, the statute can still be applied constitutionally in emergency situations. Finally, the district court concluded that it had jurisdiction to address what it called GE's "pattern and practice" challenge to EPA's administration of CERCLA's UAO provisions, i.e., GE's argument that EPA's policies and procedures for issuing UAOs exacerbate CERCLA's constitutional deficiencies, and it allowed discovery on that claim to proceed. *GE III*, 362 F. Supp. 2d at 333-37.

Following discovery, the district court granted EPA's motion for summary judgment on the pattern and practice challenge as well. The court began by finding that certain "consequential injuries" that PRPs allegedly suffer as a result of UAOs—including decline in stock price, loss of brand value, and increased cost of financing—qualify as property interests entitled to due process protection. *GE IV*, 595 F. Supp. 2d at 20-21. What's more, the court found that GE had shown that harm to these interests was "significant," because noncomplying PRPs suffer millions of dollars in damages to brand and market value. *Id.* at 30. The district court nonetheless concluded that the significance of these interests, when balanced against the government's interest and the risk of error in UAO procedures, was insufficient to render EPA's practices unconstitutional. *Id.* at 32-39; *see Mathews v. Eldridge*, 424 U.S. 319 (1976).

GE appeals both decisions. We review the district court's entry of summary judgment de novo. *See, e.g.*, *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 489 (D.C. Cir. 2009).

II.

We begin with GE's facial challenge. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745. Although the precise standard for facial challenges remains "a matter of dispute," *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010), to prevail GE must establish either "'that no set of circumstances exists under which [CERCLA's UAO provisions] would be valid,' or that [those provisions] lack[] any 'plainly legitimate sweep,'" *id.* (quoting *Salerno*, 481 U.S. at 745 and *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in the judgments) (citation omitted)); *see Troxel v. Granville*, 530 U.S. 57, 85 (2000) (Stevens, J., dissenting) (explaining that facial invalidation is inappropriate under the "plainly legitimate sweep" standard where the statute's application would be constitutional "in many circumstances").

The Fifth Amendment to the United States Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'liberty' or 'property.' Only after finding the deprivation of a protected interest do we look to see if the [government's] procedures comport with due process." *Amer. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (citations omitted). At this second step, we apply the now-familiar *Mathews v. Eldridge* balancing test, considering (1) the significance of the private party's protected interest, (2) the government's interest, and (3) the risk of erroneous deprivation and

"the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335.

GE asserts that UAOs deprive PRPs of two types of protected property: (1) the money PRPs must spend to comply with a UAO or the daily fines and treble damages they face should they refuse to comply; and (2) the PRPs' stock price, brand value, and cost of financing, all of which, GE contends, are adversely affected by the issuance of a UAO. We address each of these alleged deprivations in turn.

Costs of Compliance, Fines, and Damages

The parties agree that the costs of compliance and the monetary fines and damages associated with noncompliance qualify as protected property interests. They disagree, however, as to whether judicial review is available before any deprivation occurs. EPA contends that CERCLA gives PRPs the right to pre-deprivation judicial review: by refusing to comply with a UAO, a PRP can force EPA to file suit in federal court, where the PRP can challenge the order's validity before spending a single dollar on compliance costs, damages, or fines. GE responds that noncompliance—and thus pre-deprivation judicial review—is but a theoretical option. According to GE, daily fines and treble damages "are so severe that they . . . intimidate[] PRPs from exercising the purported option of electing not to comply with a UAO so as to test an order's validity" via judicial review. Appellant's Br, 49. PRPs are thus forced to comply and spend substantial sums prior to any hearing before a neutral decisionmaker. Because "the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to a final deprivation of a property interest," GE argues, CERCLA's failure to provide any realistic avenue for

pre-deprivation review is fatal to the Act's constitutionality. Appellant's Br. 24 (quoting *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991)) (internal quotation marks omitted).

GE's argument hinges on the Supreme Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny. Under those cases, a statutory scheme violates due process if "the penalties for disobedience are by fines so enormous . . . as to intimidate the [affected party] from resorting to the courts to test the validity of the legislation [because] the result is the same as if the law in terms prohibited the [party] from seeking judicial [review]" at all. *Id.* at 147. The Supreme Court has made clear, however, that statutes imposing fines—even "enormous" fines—on non-complying parties may satisfy due process if such fines are subject to a "good faith" or "reasonable ground[s]" defense. *See Reisman v. Caplin*, 375 U.S. 440, 446-50 (1964); *Okla. Operating Co. v. Love*, 252 U.S. 331, 338 (1920). Courts have also held that "there is no constitutional violation if the imposition of penalties is subject to judicial discretion." *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986); *cf. Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1121 & n.8 (2d Cir. 1975).

CERCLA guarantees these safeguards. Indeed, the statute offers noncomplying PRPs several levels of protection: a PRP faces daily fines and treble damages only if a federal court finds (1) that the UAO was proper; (2) that the PRP "willfully" failed to comply "without sufficient cause"; and (3) that, in the court's discretion, fines and treble damages are appropriate. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3). As to the first of these findings—the propriety of the UAO—the district court reviews EPA's determination

de novo: although the PRP must prove that it is not liable by a preponderance of the evidence, EPA's liability determination warrants no judicial deference. *See Kelley v. EPA*, 15 F.3d 1100, 1107-08 (D.C. Cir. 1994) ("Congress . . . designated the courts and not EPA as the adjudicator of the scope of CERCLA liability."). As to the second, CERCLA's "willfulness" and "sufficient cause" requirements are quite similar to the good faith and reasonable grounds defenses the Supreme Court has found sufficient to satisfy due process, and GE does not argue otherwise. *See Reisman*, 375 U.S. at 446-50 (penalty for challenging a summons did not violate due process where fines were unavailable for a good-faith challenge); *Okla. Operating Co.*, 252 U.S. at 337 (permanent injunction against enforcement of daily fines for noncompliance with allegedly confiscatory rates would be appropriate if "plaintiff had reasonable ground to contest" them); *see also Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 391-92 (8th Cir. 1987) (finding that CERCLA's "sufficient cause" defense is constitutionally equivalent to a good faith defense and thus satisfies due process). Moreover, PRPs receive added protection from the fact that the district court has authority to decide not to impose fines even if it concludes that a recipient "without sufficient cause, willfully violate[d], or fail[ed] or refuse[d] to comply with" a UAO. 42 U.S.C. § 9606(b)(1); *see also id.* § 9607(c)(3) (district court "may" impose treble damages if a person "who is liable . . . fails without sufficient cause" to comply with a UAO). Given these safeguards, we have no basis for concluding that "[t]he necessary effect and result of [CERCLA] must be to preclude a resort to the courts . . . for the purpose of testing [a UAO's] validity." *Young*, 209 U.S. at 146. Contrary to GE's claim, then, PRPs face no Hobson's choice. We

therefore join three of our sister circuits that have rejected similar *Ex Parte Young* challenges to CERCLA's UAO regime. *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995); *Solid State Circuits*, 812 F.2d at 391-92; *Wagner Seed Co.*, 800 F.2d at 316; *see also City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865, 872 (9th Cir. 2009) (expressing approval of this holding); *cf. S. Pines Assocs. v. United States,* 912 F.2d 713, 717 (4th Cir. 1990) (rejecting due process challenge to Clean Water Act compliance orders because recipients are "not subject to . . . penalties until EPA pursues an enforcement proceeding.").

Given the foregoing, we need not address EPA's argument that the statute is, at a minimum, constitutional in emergency situations. Nor for the same reason need we consider GE's response that EPA does not actually issue UAOs in emergencies.

Stock Price, Brand Value, and Cost of Financing

GE contends that, in addition to potential cleanup costs, fines, and damages, issuance of a UAO "immediately tag[s]" a PRP "with a massive contingent liability," Appellant's Br. 14, which in turn depresses its stock price, harms its brand value, and increases its cost of financing. According to GE, these adverse impacts are "irreparable and cannot be remedied through a later, delayed challenge to [a] UAO." *Id.* at 34. Perhaps so, but we must first address an antecedent question: does the Due Process Clause protect PRPs' interest in the market's assessment of their stock, brand, and credit worthiness? *See supra* at 9-10.

As the Supreme Court has repeatedly stated, "the range of interests protected by procedural due process is not infinite." *E.g.*, *Bd. of Regents of State*

Colls. v. Roth, 408 U.S. 564, 570 (1972). Moreover, "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577; *see also Paul v. Davis*, 424 U.S. 693, 710 (1976). For due process purposes, then, it is not enough that one has "an abstract need or desire" for the asserted property; to merit due process protection, "[h]e must . . . have a legitimate claim for entitlement to it." *Roth*, 408 U.S. at 577.

GE points to no "independent source such as state law," *id.*, for its purported property interests. Nor does it deny, as EPA points out, that the company's claimed injuries are consequential, i.e., that they result not from EPA's "extinguish[ing] or modify[ing] a right recognized by state law," but rather from independent market reactions to the issuance of a UAO. Appellees' Br. 26. GE argues only that the Supreme Court and this court have "repeatedly held that consequential impacts can constitute a deprivation." Reply Br. 6.

In support, GE relies primarily on *Connecticut v. Doehr*, 501 U.S. 1 (1991), in which the Supreme Court held that a state statute authorizing ex parte prejudgment attachment of real estate violated due process. GE emphasizes the Court's statement that

> [T]he property interests that attachment affects are significant. . . . [A]ttachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even

> place an existing mortgage in technical default where there is an insecurity clause.

Id. at 11. According to GE, because "[e]very one of the deprivations identified by the Court . . . entailed nothing but consequential market reactions to the attachment," Reply Br. 6, *Doehr* stands for the proposition that consequential injuries merit due process protection. GE also relies on the Court's statement that although the effects of attachment "do not amount to a complete, physical, or permanent deprivation of real property[,] . . . the Court has never held that only such extreme deprivations trigger due process concern." 501 U.S. at 12. Indeed, the Court continued, "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Id.* This language, GE argues, demonstrates that PRPs are entitled to procedures that satisfy due process before EPA can issue a UAO that results in "temporary or partial impairments" to stock price, brand value, or cost of financing.

We disagree with GE's reading of *Doehr*'s discussion of consequential injuries. The quoted text comes not from the Court's analysis of *whether* attachment requires due process protection, but instead from the portion of its opinion weighing the *significance* of the private interests at stake—the first of the three factors *Mathews* instructs courts to consider when determining what process is due in situations where a constitutional deprivation has in fact occurred. *See id.* at 11. The Court addressed this latter question only after finding that real property attachments qualify as deprivations within the meaning of the Due Process Clause. *Id.* at 9 ("With this case we

return to the question of what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of prejudgment attachment or similar procedure."). Although the Court devoted few words to this threshold inquiry, it is well accepted that attachments themselves constitute property deprivations because, as EPA points out, they "pluck a stick from the property owner's bundle and hold it as surety." Appellees' Br. 32; *see Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932-33 (1982) (noting that "the Court has consistently held that constitutional requirements of due process apply to garnishment and prejudgment attachment procedures") Thus, although *Doehr* does hold that direct, partial impairments of property rights may well warrant due process safeguards, nothing in the opinion implies that consequential injuries, standing alone, merit due process protection. *See Doehr*, 501 U.S. at 29 (Rehnquist, C.J., concurring in part and concurring in the judgment) (noting that the filing of a lis pendens may reduce the market value of property without triggering due process because it "creates no additional right in the property"); *United States v. Register*, 182 F.3d 820, 836-37 (11th Cir. 1999) (same). Rather, *Doehr* stands for the proposition that consequential injuries can affect the significance of the private interests at stake and thus the nature of the procedures required.

Stripped of its reliance on *Doehr*, GE's case boils down to this: by declaring that a PRP is responsible for cleaning up a hazardous waste site, a UAO harms the PRP's reputation, and the market, in turn, devalues its stock, brand, and credit rating. Viewed this way, GE's argument is foreclosed by *Paul v. Davis*, 424 U.S. 693. There the Supreme Court held

that a sheriff's inclusion of Davis's name and photograph on a flyer captioned "Active Shoplifters" implicated no due process interest. Although the poster alerted the public to a potentially damaging allegation about Davis and may have seriously limited his future employment opportunities, *id.* at 697, the Court found that it extinguished none of Davis's previously held legal rights—state "law [did] not extend to [him] any legal guarantee of present enjoyment of reputation," *id.* at 711-12. In so holding, the Court distinguished *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), which ruled that a law allowing for "posting"—forbidding the sale of alcoholic beverages to persons determined to have become hazards based on their "excessive drinking"—violated due process. As the Court explained in *Davis*, the law at issue in *Constantineau* went beyond mere stigma, depriving the plaintiff "of a right previously held under state law . . . to purchase or obtain liquor in common with the rest of the citizenry." *Davis*, 424 U.S. at 708. "[I]t was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards" in *Constantineau*. *Id.* at 708-09. *Davis*'s rule is thus clear: stigma alone is insufficient to invoke due process protections. *See id.* at 704-06; *see also Siegert v. Gilley*, 500 U.S. 226, 234 (1991) ("[S]o long as . . . damage flows from injury caused by the defendant to a plaintiff's reputation," no constitutional claim is alleged).

Our cases elaborating on *Davis*'s so-called stigma-plus rule find it satisfied only where plaintiffs show, in addition to reputational harm, that (1) the government has deprived them of some benefit to which they have a legal right, e.g., the "right to be considered for government contracts in common with

all other persons," *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1108-09 (D.C. Cir. 1985) (quoting *Mosrie v. Barry*, 718 F.2d 1151, 1161 (D.C. Cir. 1983)) (internal quotation marks omitted); or (2) the government-imposed stigma is so severe that it "broadly precludes" plaintiffs from pursuing "a chosen trade or business," *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 644 (D.C. Cir. 2003). Here, although a UAO may well damage the PRP's reputation, GE alleges neither of these additional injuries. This case is thus controlled by *Davis*, not *Constantineau*.

Our conclusion is unaffected by the fact that GE alleges "property" harm while *Davis* addresses a "liberty" claim. Like other circuits, we have applied the stigma-plus framework to property claims, requiring plaintiffs to show that alleged reputational harm *completely* destroys the value of their property. For example, in *Industrial Safety Equipment Ass'n v. EPA*, 837 F.2d 1115, 1121-22 (D.C. Cir. 1988), we concluded that EPA's issuance of a report warning against the use of certain asbestos-protection respirators, but not prohibiting them, did not deprive manufacturers of their property interest in the respirators' EPA certifications. Although the report would surely make the respirators less popular and therefore less profitable, and although there was "no question that [the manufacturers] possess[ed] cognizable property interests in their respirator certifications," "[t]his indirect effect . . . [could] hardly be said to constitute a constitutional deprivation of property deserving fifth amendment protection" because it "in no way . . . rendered valueless" plaintiffs' certifications. *Id.* at 1122; *see also WMX Techs., Inc. v. Miller*, 197 F.3d 367, 373-76 (9th Cir. 1999) (en banc) (damage to business goodwill did not implicate the Due Process Clause because the

asserted injury affected only reputation); *Wells Fargo Armored Serv. Corp. v. Ga. Pub. Serv. Comm'n*, 547 F.2d 938, 941 (5th Cir. 1977) (indirect injuries to property right in state motor carrier license implicate the Due Process Clause only where they "effectively render the property valueless").

The Second Circuit's application of *Davis* to a statutory scheme quite similar to CERCLA provides additional support for our conclusion. In *Asbestec Construction Services v. EPA*, 849 F.2d 765, 767, 769 (2d Cir. 1988), the court considered a due process challenge to a Clean Air Act "compliance order" that, like a UAO, found that the recipient had violated federal law, ordered specified compliance actions, and threatened "an EPA court action for relief" if the recipient failed to comply. According to the recipient, the compliance order implicated its property and liberty rights under the Fifth Amendment by "inhibit[ing] its ability to obtain asbestos removal contracts." *Id.* at 769. The Second Circuit rejected both arguments. As to the property claim, the court noted that the recipient had pointed to no "certain benefits," such as government contracts, from which the order excluded it. *Id.* at 770. As to the recipient's liberty argument, the court concluded that "[t]he possible adverse effect of the order on petitioner's future business prospects is insufficient by itself to give rise to a claim that one has been deprived of a liberty interest." *Id.* at 769. Attempting to distinguish *Asbestec*, GE points out that the compliance order at issue there required no remedial action, but this difference is irrelevant because the property interest alleged in *Asbestec*—a right to a positive business reputation and the profits it yields—is, in essence, the same interest GE alleges here.

GE nonetheless insists that this court has "held that consequential impacts can constitute a deprivation." Reply Br. 6. The cases GE cites, however, simply reiterate *Davis*'s stigma-plus principle. Thus, in *Doe v. United States Department of Justice*, we found that a government employee's liberty rights were implicated by a "discharge[] from government employment amidst stigmatizing allegations which have effectively foreclosed future employment opportunities with the government as well as private employers." 753 F.2d at 1110. Similarly, in *Reeve Aleutian Airways, Inc. v. United States*, we held that the government's suspension of an airline from a military airlift transportation program "based on stigmatizing charges" that the airline was unsafe did affect its liberty interest. 982 F.2d 594, 598 (D.C. Cir. 1993). Here, even assuming UAOs are stigmatizing, their consequences fall far short of completely foreclosing employment (*Doe*), or suspending a government contract (*Reeve Aleutian Airways*).

Finally, seeking to distinguish UAOs from government actions "like filing a complaint or issuing a policy report," Reply Br. 8 (quoting Appellees' Br. 19) (internal quotation marks omitted), GE insists that the issuance of a UAO triggers due process protections because it follows a factfinding, adjudicatory proceeding. In support, the company cites two cases, *Jenkins v. McKeithen*, 395 U.S. 411 (1969) (plurality opinion), and *Hannah v. Larche*, 363 U.S. 420 (1960). GE, however, failed to make this argument or discuss these cases until its reply brief, thus depriving EPA of an opportunity to respond. "To prevent this sort of sandbagging . . . , we have generally held that issues not raised until the reply brief are waived." *Bd. of Regents of Univ. of Wash. v. ERA*, 86 F.3d 1214, 1221

(D.C. Cir. 1996) (citations omitted). We do so here as well.

That said, given the extent to which GE emphasized this argument both in its reply brief and at oral argument, it is worth pointing out that *Hannah* and *Jenkins* are not nearly as broad as the company claims. In *Hannah,* the Supreme Court upheld the Civil Rights Commission's rules of procedure, finding that the Commission's refusal to identify those who submitted complaints or to allow for cross-examination of witnesses did not violate the Due Process Clause. The Court relied on the fact that the Commission functioned as an investigative entity:

> It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights.

Hannah, 363 U.S. at 441. Nine years later, in *Jenkins,* the Supreme Court reached the opposite result with respect to the constitutionality of a statute that created the Louisiana Labor-Management Commission of Inquiry, a body whose members—appointed by the Governor and empowered to act only upon his referral—investigated possible criminal violations in the field of labor-management relations. The Commission was "required to determine, in public findings, whether there [was] probable cause to believe violations of the criminal laws ha[d] occurred," *Jenkins*, 395 U.S. at 416, and the plaintiff "alleged that [its] very purpose . . . [was] to find persons guilty of violating criminal laws without trial or procedural

safeguards" such as the right to present evidence or to confront witnesses, *id.* at 424. Although noting that "the structure and powers of the Commission [at issue in *Jenkins*] [were] similar to those of the Civil Rights Commission" upheld in *Hannah*, *id.* at 425, the *Jenkins* plurality found that the Louisiana body "exercise[d] a function very much akin to making an official adjudication of criminal culpability," i.e., "find[ing] named individuals guilty of violating the criminal laws . . . and . . . brand[ing] them as criminals in public," *id.* at 427-28. As a result, the Court concluded, "the minimal requirements" of due process applied. *Id.* at 428.

GE argues that *Hannah* and *Jenkins*, taken together, establish that "where government action moves from investigatory to adjudicatory, the government must provide pre-deprivation hearings." Reply Br. 12. To be sure, some of *Jenkins*'s language, considered in isolation, might suggest such a rule. But we think the better reading is that in *Jenkins* the Court was addressing only adjudications of criminal culpability. In distinguishing *Hannah,* the Court relied heavily on the fact that the Louisiana Commission was "concerned only with . . . find[ing] named individuals guilty of violating the criminal laws . . . and . . . brand[ing] them as criminals in public." *Jenkins*, 395 U.S. at 427-28. Indeed, in a discussion consuming only a single page of the U.S. Reports, the Court mentioned no fewer than six times that the Commission was charged with accusing individuals of criminal conduct. *Id.* The Court emphasized the same point in *Davis* when distinguishing *Jenkins.* Although the *Davis* majority and dissent disagreed as to whether *Davis*' holding contradicted *Jenkins,* they found common ground in characterizing *Jenkins* as a case involving adjudications of criminal liability. The

majority described the Louisiana Commission as "an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing." *Davis*, 424 U.S. at 706 n.4 (quoting *Jenkins*, 395 U.S. at 438 (Harlan, J., dissenting)) (internal quotation marks omitted). Similarly, the dissent summarized *Jenkins* as holding that "the official characterization of an individual as a criminal affects a constitutional 'liberty' interest." 424 U.S. at 727 (Brennan, J., dissenting). Moreover, in the forty years since the Court decided *Jenkins*, it has never cited the case for the broader proposition advocated by GE, i.e., that the Due Process Clause is implicated whenever the government uses an adjudicatory process to find facts with respect to a particular individual or corporation. *Cf. Donaldson v. United States*, 400 U.S. 517, 540 (1971) (Douglas, J., concurring) (*Jenkins* "held that the commission exercised an accusatory function and was empowered to brand people as criminals. Therefore, due process required" certain procedural protections) (citation omitted). Given this, and given *Jenkins*'s repeated emphasis on criminal culpability, the decision has no applicability to CERCLA's UAO procedures, which are not only entirely civil, but fall far short of transforming EPA into a body "concerned only with" labeling PRPs as polluters. *Jenkins*, 395 U.S. at 427.

III.

GE contends that even if CERCLA's UAO provisions are facially constitutional, EPA administers the statute in a way that denies PRPs due process. Before addressing the merits of this "pattern and practice claim," however, we must consider EPA's

argument that the district court lacked jurisdiction to entertain it.

Jurisdiction

EPA's jurisdictional argument rests on CERCLA section 113(h), which provides that "[n]o Federal court shall have jurisdiction . . . to review . . . any [unilateral administrative] order," until either cleanup work is complete or EPA brings an enforcement action. 42 U.S.C. § 9613(h). According to EPA, "GE's . . . 'pattern and practice' claim[] necessarily forced the district court to 'review' individual UAOs in violation of CERCLA section 113(h)." Appellees' Br. 40-41. GE responds that because it seeks no relief as to any particular UAO, its pattern and practice claim falls outside section 113(h)'s jurisdictional bar. What's more, GE argues, this court already held in *GE II* that the district court had jurisdiction over its pattern and practice claim.

We disagree with GE's reading of *GE II*. For one thing, in *GE II* we repeatedly referred to the company's challenge as a "facial" attack. *See GE II*, 360 F.3d at 189, 190, 191, 192. Indeed, we said only that "[w]e hold that the plain text of § 113(h) does not bar GE's *facial* constitutional challenge to CERCLA." *Id.* at 189 (emphasis added). In its *GE II* briefs, moreover, the company never even hinted that it meant to bring a pattern and practice challenge to EPA's administration of the statute. For example, in its opening brief GE repeatedly characterized its claim as facial, emphasizing that "*nothing* about the resolution of the merits of GE's constitutional claim would change *in the slightest* even if EPA had *never* taken a single § 104 [removal or remedial] action or issued a single § 106(a) [unilateral administrative] order anywhere in the United States." Brief of Appellant at 20, *GE II*

(No. 03-5118). It is true, as GE points out, that in *GE II* we relied on *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), in which the Supreme Court allowed a pattern and practice due process challenge to the way in which the Immigration and Naturalization Service was enforcing the immigration laws. But we cited *McNary* only to support our narrow reading of section 113(h)'s text, i.e., that the provision presents no bar to a facial challenge. *See GE II*, 360 F.3d at 192-93; *see also City of Rialto*, 581 F.3d at 880 (characterizing *GE II* as holding only that "a facial challenge was not barred").

Although we thus read *GE II* as holding only that the district court had jurisdiction over GE's facial challenge, we nonetheless agree with GE that the district court had jurisdiction to entertain its pattern and practice claim as well. Section 113(h) is quite clear: it only prohibits district courts from reviewing UAOs before enforcement or reimbursement proceedings have been initiated. Nothing in the provision bars a pattern and practice challenge that seeks no relief with respect to any particular UAO. To be sure, as EPA emphasizes, the district court did calculate a UAO error rate. But significantly for the section 113(h) issue before us, GE sought no relief with respect to individual UAOs, nor did the district court grant any.

This case is therefore controlled by *McNary*. There the Supreme Court concluded that the plain language of the immigration statute—which barred review "of a determination respecting an application" for special agricultural worker (SAW) status, 8 U.S.C. § 1160(e)(1)—referred only to judicial review of "a single act rather than . . . a practice or procedure employed in making decisions," 498 U.S. at 492.

Thus, although the statute prohibited courts from reviewing denials of individual applications for SAW status, district courts could nonetheless consider "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.* The same principle applies to CERCLA section 113(h).

EPA argues that *McNary*'s outcome was dictated by a consideration not present here. In *McNary*, the Supreme Court pointed out that because the statute provided for review of SAW determinations only in deportation proceedings and only on a limited record, barring pattern and practice challenges would result in "a total denial of judicial review of [plaintiffs'] . . . constitutional and statutory claims." 498 U.S. at 497. According to EPA, *McNary* therefore requires that plaintiffs like GE who seek to bring pattern and practice challenges first show that the statute provides no meaningful judicial review for their claims. Because GE could pursue its due process claims in an enforcement or reimbursement proceeding, EPA argues, the district court lacked jurisdiction over the company's pattern and practice challenge.

Properly read, however, *McNary*'s conclusion that the immigration statute's jurisdiction-stripping provision presented no bar to a pattern and practice suit did not depend on the unavailability of alternative means of judicial review. Instead, it rested entirely on the Court's analysis of the jurisdictional provision's text: "Given Congress' choice of statutory language, we conclude that challenges to the procedures used by INS do not fall within the scope of [the jurisdictional bar]. Rather, we hold that [that provision] applies only to review of denials of individual SAW applications." *Id.* at 494. Not until the next section of

its opinion, in which it distinguished *Heckler v. Ringer*, 466 U.S. 602 (1984), did the Court address the availability of alternative routes of judicial review. In *Ringer*, four plaintiffs seeking Medicare reimbursement challenged a policy adopted by the Secretary of Health and Human Services pursuant to the Medicare statute, but in doing so they also sought to establish a right to reimbursement in their particular cases. The Court concluded that because the plaintiffs' claims were "at bottom, . . . claim[s] that they should be paid" for their particular procedures—which, under the statute, required administrative exhaustion—the district court had no jurisdiction to review them outside the administrative scheme. *Id.* at 614; *see id.* at 620. In so holding, the Court emphasized that plaintiffs' claims were neither separate from nor collateral to their individual Medicare determinations: the relief they sought "to redress their supposed 'procedural' objections" included "a 'substantive' declaration . . . that the expenses of [their surgeries were] reimbursable under the Medicare Act." *Id.* at 614. Distinguishing *Ringer* in *McNary*, the Court pointed out that the *McNary* plaintiffs sought no ruling on their individual determinations, and that "[u]nlike the situation in [*Ringer*]" a ruling in their favor would not "have the effect of establishing their entitlement to SAW status" outside the exclusive statutory regime. *McNary*, 498 U.S. at 495. Likewise, because a ruling in GE's favor would invalidate not a single UAO, section 113(h) presents no bar to the company's pattern and practice claim.

Although occasionally speaking in broad terms, our cases interpreting *McNary* hew to this distinction between collateral and particularized claims. For example, in *Daniels v. Union Pacific Railroad Co.*, 530 F.3d 936, 943-44 (D.C. Cir. 2008), we held that

McNary did not give the district court jurisdiction over a due process challenge to railroad employees' demotions, i.e., individual challenges to particular agency actions that were otherwise reviewable exclusively in the court of appeals. True, we stated that "the availability of effective judicial review is the touchstone of the *McNary* exception," *id.* at 943, but we said that only in concluding that the constitutional nature of plaintiffs' claims was insufficient, standing alone, to avoid the statutory bar on district court review of precisely the type of individualized claims plaintiffs had brought. Indeed, the plaintiffs' claims were akin to those in *Ringer*, not *McNary*: among other things, they sought "reinstate[ment] . . . with full back-pay and benefits," *id.* at 942 n.11 (internal quotation marks omitted), relief in no way collateral to their substantive claims. Similarly, in *John Doe, Inc. v. DEA*, 484 F.3d 561 (D.C. Cir. 2007), we rejected a drug manufacturer's argument that *McNary* allowed the district court to review the denial of a permit otherwise reviewable only in the court of appeals. Although we did say that "the holding in *McNary* cannot be divorced from the Court's obvious concern that, absent district court review of the plaintiffs' claims, meaningful judicial review would have been entirely foreclosed," *id.* at 569, we made that observation in the context of a *Ringer*-like challenge—the drug manufacturer sought review of a particular order denying his permit application, a claim the statute required to be heard in the court of appeals. *See id.* at 564. In fact, *Doe* made no claims at all relating to DEA "patterns" or "practices." *See id.* at 570-73; *see also Fornaro v. James*, 416 F.3d 63, 68 (D.C. Cir. 2005) (finding that *McNary* did not support district court jurisdiction outside of administrative review process where plaintiffs sought a ruling that

would require the payment of benefits in particular cases); *City of Rialto*, 581 F.3d at 877 (finding that district court lacked jurisdiction over claim that "[l]ike the claims in *Ringer* . . . [was] nothing more than a request for direct review of the validity" of a UAO). Accordingly, our cases interpreting *McNary* only bar claimants from circumventing statutory provisions that give appellate courts jurisdiction to hear their individual challenges. Those cases in no way run counter to *McNary*'s holding that claims falling outside the text of a jurisdiction-channeling provision—like GE's pattern and practice challenge—may proceed in the district court.

Finally, EPA contends that even if section 113(h) permits GE's pattern and practice claim, GE lacks standing to bring it. *See Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 56 (1993) (noting that if a statute with a jurisdiction-delaying provision allows review of pattern and practice claims, those "claims still must satisfy the jurisdictional and justiciability requirements that apply in the absence of a specific congressional directive"). Constitutional standing is satisfied if a plaintiff demonstrates "the now-familiar elements of injury in fact, causation, and redressability." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). GE easily satisfies these requirements.

GE claims that EPA's allegedly unconstitutional practices and procedures repeatedly injure the company. For its part, "EPA does not dispute . . . that [it] has issued 68 UAOs to GE," *GE IV*, 595 F. Supp. 2d at 17, nor does it challenge the company's allegations that it has received additional UAOs "during the pendency of this case," and that it "is currently participating in response actions at 79 active

CERCLA sites at any of which it may be issued UAOs" in the future, Reply Br. 22. Thus, GE has a personal stake in the outcome of this litigation, and unlike some of the plaintiffs in the cases EPA cites, the company alleges past injury and threatened future harm without relying on the issuance of UAOs to third parties. *Cf. City of Rialto*, 581 F.3d at 877 (finding that plaintiff lacked prudential standing to raise claims of third parties). Finally, GE's injuries, if proven, are clearly attributable to EPA's administration of CERCLA and redressible by a declaratory judgment finding such practices unconstitutional.

Pattern and Practice Challenge

Having concluded that the district court had jurisdiction to consider GE's pattern and practice claim, we can quickly dispose of its merits. Although GE's briefs are less than clear, we understand the company to be arguing that the way in which EPA implements CERCLA's UAO provisions increases the frequency of UAOs and decreases their accuracy, thus tipping the *Mathews v. Eldridge* balance toward a finding that the process is constitutionally defective. For example, GE points to EPA's "enforcement first" policy, by which the agency issues UAOs whenever settlement negotiations fail, as well as to the agency's delegation of authority to subordinate regional employees who allegedly issue UAOs in time to comply with internal agency reporting deadlines. Appellant's Br. 45-46. GE argues that by encouraging EPA to issue UAOs more frequently, and by increasing the risk that those UAOs will be erroneous, these and other policies targeted in the company's briefs make it more likely that PRPs will suffer pre-hearing "deprivations" in the form of damage to their stock price, brand value, and credit rating. As GE's counsel

conceded at oral argument, however, if such harms are insufficient to trigger due process protection, then this argument must fail. *See* Oral Arg. Tr. 21-23. Thus, because we have held that these consequential effects do not qualify as constitutionally protected property interests, *see supra* at 15-19, we need not—indeed, we may not—apply *Mathews v. Eldridge* to determine what process is due. In other words, even if GE is correct that EPA's implementation of CERCLA results in more frequent and less accurate UAOs, the company has failed to identify any constitutionally protected property interest that could be adversely affected by such errors. *See Roth*, 408 U.S. at 570-71 ("[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake.").

In a few sentences in its opening brief, GE also contends that even if CERCLA is not facially coercive, EPA administers the statute in a way that "intimidate[s] PRPs from exercising the purported option of electing not to comply with a UAO so as to test an order's validity, giving rise to an independent due process violation under *Ex Parte Young*." Appellant's Br. 49. To the extent GE makes this argument, it urges us to infer coercion from the fact that the vast majority of PRPs elect to comply with UAOs. *Id.* at 49-50. As GE's amicus puts it, "[t]he dearth of noncomplying PRPs reflects the exceptional coerciveness of UAOs and strongly supports GE's argument that the regulatory scheme amounts to a violation of due process under *Ex Parte Young*." Chamber of Commerce Amicus Br. 20.

Rejecting this argument, the district court began by explaining, properly in our view, that the pattern

and practice claim adds little to GE's facial *Ex Parte Young* challenge: regardless of EPA's policies—for example, GE alleges that the agency coerces PRPs into compliance by threatening to seek multiple penalties for violations at a single UAO site—"a *judge* ultimately decides what, if any, penalty to impose." *GE IV*, 595 F. Supp. 2d at 18. As noted above, moreover, CERCLA's sufficient cause and willfulness defenses protect PRPs from unwarranted fines and damages. *See supra* at 118-19. As to GE's argument that the high incidence of UAO compliance evidences coercion, the district court found that "GE's own expert . . . demonstrate[d] that instances of noncompliance are sufficiently numerous to suggest that PRPs are not, in fact, forced to comply." *GE IV*, 595 F. Supp. 2d at 28-29 (GE's expert found that "of the 1,638 PRPs who have been issued UAOs most recently, there were 75 instances of noncompliance—a rate of 4.6 percent."). And for our part, we observe that in light of the extensive procedures CERCLA requires EPA to follow before issuing a UAO, including notice and comment, *supra* at 114-15, recipients may be complying in large numbers not because they feel coerced, but because they believe that UAOs are generally accurate and would withstand judicial review. In any event, given that GE squarely challenges neither the district court's factual findings, *see* Fed. R. Civ. P. 52(a)(6), nor its legal conclusions, we have no basis for second-guessing the district court's resolution of this issue.

IV.

We fully understand, as GE argues, that the financial consequences of UAOs can be substantial. We also understand that other administrative enforcement schemes that address matters of public health and safety may provide greater process than does

CERCLA. *See* Appellant's Br. 40-41; Chamber of Commerce Amicus Br. 25-30; *but see* NRDC Amicus Br. 30-33 (arguing that "[n]umerous environmental statutes other than CERCLA establish regimes in which an agency orders an entity to comply with a statute without prior . . . trial-type hearings"). Such concerns, however, do not implicate the constitutionality of CERCLA or of the policies and practices by which EPA implements it. Even if "[i]n the best of all worlds," greater process "might be desirable, . . . Congress . . . struck a different balance" in designing CERCLA's UAO regime. *Ringer*, 466 U.S. at 627. Because our judicial task is limited to determining whether CERCLA's UAO provisions violate the Fifth Amendment either on their face or as administered by EPA, we affirm the decisions of the district court.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

09-5092
1:00-cv-02855-JDB

GENERAL ELECTRIC COMPANY,
Appellant,

v.

LISA PEREZ JACKSON, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY
AND ENVIRONMENTAL PROTECTION AGENCY,
Appellees.

September Term 2010
Filed On: September 30th, 2010

Before: Sentelle, Chief Judge, and Ginsburg, Henderson,* Rogers, Tatel, Garland,* Brown,* Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is ORDERED that the petition be denied.

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* Circuit Judges Henderson, Garland, and Brown did not participate in this matter

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

Civil Action No. 00-2855 (JDB).

GENERAL ELECTRIC COMPANY,
Plaintiff,

v.

LISA JACKSON,[1] Administrator, United States Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant.

Jan. 27, 2009.

MEMORANDUM OPINION

JOHN D. BATES, District Judge.

This case presents a broad constitutional attack on a significant federal environmental program. Plaintiff General Electric Company ("GE" or "plaintiff") challenges the U.S. Environmental Protection Agency's ("EPA") administration of section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), 42 U.S.C.

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[1] Former acting administrator Stephen L. Johnson was previously named as the lead defendant in this case. Pursuant to Federal Rule of Civil Procedure 25(d), the Court automatically substitutes his successor, Lisa Jackson, as the new lead defendant.

§ 9601 *et seq.* GE contends that EPA's "pattern and practice" of administering section 106, 42 U.S.C. § 9606, violates the Due Process Clause of the Fifth Amendment. Am. Compl. at ¶ 1. Before the Court are the motions for summary judgment of GE and EPA and its administrator, Lisa Jackson.[2] For the reasons that follow, the Court rejects GE's novel, but substantial, challenge. On the record presented, the administrative order regime under section 106 of CERCLA, as administered by EPA, does not offend due process.

BACKGROUND

I. The CERCLA Framework.[3]

CERCLA was enacted to ensure efficient and expedient clean-up of hazardous waste sites resulting from industrial pollution. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994); *see also United States v. Bestfoods*, 524 U.S. 51, 55 (1998). Congress intended the parties responsible for polluting a site to clean it up themselves, or at least to pay the costs of clean-up. *See Control Data Corp. v.*

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[2] EPA styled its motion as a motion for judgment on the pleadings, or alternatively, a motion for summary judgment. The same legal standard applies for each kind of motion. *See Greenhouse v. Geren*, 574 F. Supp. 2d 57, 63-64 (D.D.C. 2008). Because the record in this case contains material from the parties' extensive discovery, the Court will treat EPA's motion as one for summary judgment.

[3] The Court set forth a more comprehensive discussion of the CERCLA framework in its previous opinions in this case. *See General Electric Co. v. Whitman*, 257 F. Supp. 2d 8, 12-14 (D.D.C. 2003) (*General Electric I*); *General Electric Co. v. Johnson*, 362 F. Supp. 2d 327, 330-31 (D.D.C. 2005) (*General Electric III*); *see also General Electric Co. v. EPA*, 360 F.3d 188, 189-90 (D.C. Cir. 2004) (*General Electric II*).

S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995). Under CERCLA, once EPA identifies a hazardous site, it seeks to identify "potentially responsible parties" ("PRPs"). EPA may then initiate negotiations with PRPs to clean up a site. *See* 42 U.S.C. § 9622.

EPA has several options if negotiations fail. One option is to perform the clean-up itself, paying for it out of the so-called "Superfund" established by Congress for this purpose. EPA would then bring an action in federal district court under section 107 of CERCLA to recover clean-up costs from responsible parties. *Id.* §§ 9607(a)(4)(A), 9611(a). Another option is to seek an order from a federal district court compelling a responsible party to clean up a hazardous site. *Id.* § 9606(a). EPA's third option is to issue a "unilateral administrative order" ("UAO") under section 106, ordering PRPs to clean up a site. *Id.* EPA may issue a UAO upon a finding "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." *Id.* EPA's practice of issuing UAOs under section 106 is at the heart of GE's due process challenge in this case.

Under CERCLA, a PRP that believes it is not responsible for the clean-up faces a choice whether or not to comply with a UAO. If the PRP complies, it may seek reimbursement from other PRPs or from EPA itself upon completion of the clean-up. *Id.* § 9606(b). If the PRP does not comply, then EPA must file a civil action in federal district court to enforce the UAO. *Id.* § 9606(a). The court reviews EPA's remedy selection (i.e., its selection of a UAO) under the Administrative Procedure Act's "arbitrary and capricious" standard. *See id.* § 9606(b)(2)(D). The

court reviews EPA's selection of the responsible party *de novo*. *See Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994).

EPA may seek two kinds of monetary penalties if a PRP does not comply with a UAO. First, if the noncomplying PRP lacks "sufficient cause" and willfully violates the order, then EPA may seek $32,500 for each day of noncompliance. *Id.* § 9606(b). Second, EPA may seek punitive damages up to three times "the amount of any costs incurred by the [Superfund] as a result of such failure to take proper action." *Id.* § 9607(c)(3). But these penalties are not automatic under CERCLA. If the reviewing court finds that the PRP had sufficient cause for noncompliance, then it cannot impose either form of penalty. *Id.* §§ 9606(b), 9607(c)(3). Even absent a finding of sufficient cause, moreover, the court has complete discretion as to the imposition and amount of any penalty. *Id.* § 9607(c)(3).

II. Procedural History

GE filed its Complaint on November 28, 2000, and amended it on March 14, 2001. GE challenges CERCLA in two ways. First, GE alleges that the text of CERCLA itself facially violates the Due Process Clause. Am. Compl. at ¶¶ 21-28, 50, 54. Second, GE alleges that EPA's "pattern and practice" of administering the UAO regime under section 106 violates GE's due process rights. *Id.* at ¶¶ 17-20, 51-52, 54.

In March 2001, EPA moved to dismiss GE's Amended Complaint on jurisdictional grounds. EPA argued that this Court lacked subject matter jurisdiction because section 113(h) of CERCLA bars judicial review of a section 106 order until the clean-up is complete. This Court agreed and granted EPA's

motion to dismiss. *General Electric I*, 257 F. Supp. 2d at 12. On appeal, however, the D.C. Circuit reversed and instructed this Court to consider the merits of GE's due process challenge on remand. *General Electric II*, 360 F.3d at 194. The court of appeals agreed that section 113(h) bars review of "as-applied, or particularized challenges," but concluded that section 113(h) does not bar "facial, or 'systemic'" challenges to CERCLA. *Id.* at 192. The court of appeals relied primarily on two cases to reach its holding: *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974), and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 492-94 (1991). *Robison* was a facial constitutional challenge to the Veterans' Readjustment Benefits Act, 38 U.S.C. § 211(a). Section 211 of that Act barred review of individual benefit determinations, but the Supreme Court held that section 211 did not extend to facial constitutional challenges to the statute. *Robison*, 415 U.S. at 367. *McNary* was a challenge to the Immigration and Naturalization Service's "pattern and practice" of administering the Special Agricultural Workers (SAW) provisions of the Immigration Reform Control Act, 8 U.S.C. § 1160. Section 210(e) of that Act barred judicial review "of a determination respecting an application" for SAW status, but the Supreme Court held that section 210(e) did not apply to "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *McNary*, 498 U.S. at 492. Because *Robison* and *McNary* permitted facial and pattern and practice claims to proceed in the face of provisions similar to CERCLA's section 113(h), the D.C. Circuit instructed this Court to consider GE's due process challenges to CERCLA on remand. 360 F.3d at 194.

In May 2004, EPA filed a motion for summary judgment. EPA argued that GE's challenge was solely a facial one and that it had to be analyzed under the *Salerno* doctrine. *See United States v. Salerno*, 481 U.S. 739 (1987). Under *Salerno*, a plaintiff pursuing a facial challenge must establish that a statute is unconstitutional in every application. *Id.* at 745. EPA argued that, at the very least, CERCLA is constitutional in emergency situations and hence GE's facial challenge had to fail. This Court agreed and granted EPA's motion for summary judgment on GE's facial (or textual) challenge to CERCLA in March 2005. *General Electric III*, 362 F. Supp. 2d at 330. Considering only the text of CERCLA, this Court held that section 106 does not deprive PRPs of property interests without a sufficient judicial hearing. *Id.* at 338-42. Nor is section 106 as written so coercive as to deprive PRPs of procedural due process under *Ex parte Young* and its progeny. *Id.* at 342-43. This Court held that "[t]he ability of the PRP to choose, under the language of the statute, whether to comply with a section 106 order is key." *Id.* at 339. By choosing not to comply, a PRP receives a pre-deprivation hearing in a federal district court. That court also has the sole discretion to impose penalties for noncompliance, thereby releasing any unconstitutional pressure that might otherwise be inherent in the statute. Finally, the Court held that because section 106 would be constitutional in a true emergency situation even if a PRP were deprived of a property interest before an adequate judicial hearing, GE's facial challenge failed under *Salerno*. *Id.* at 343-44.

This Court disagreed, however, that GE's facial and "pattern and practice" claims were one and the same. *See id.* at 333-36. EPA argued that when the court of appeals remanded the case to this Court, it

had held that only facial claims cleared the section 113(h) jurisdictional hurdle. Therefore, EPA reasoned, only GE's facial challenge was before this Court on remand. To be sure, this Court recognized that some isolated language from the D.C. Circuit's opinion did support EPA's position. But the D.C. Circuit's opinion, read as a whole, firmly undercut that position. This Court noted that the court of appeals clearly distinguished between facial, systemic, and particularized challenges. *Id.* at 334 (citing *General Electric II*, 360 F.3d at 192). Moreover, the court of appeals held that facial and systemic challenges are treated similarly in analyzing jurisdictional provisions like section 113(h). The rationale, the court of appeals reasoned, is that neither facial nor systemic challenges impair the policy considerations underlying such jurisdictional bars. *General Electric II*, 360 F.3d at 194. Section 113(h), and provisions like it, are meant to ensure prompt responses to agency action and to avoid litigation until the responses are complete. Because neither facial nor systemic challenges would delay the clean-up at any particular site, they are treated the same for purposes of section 113(h). *Id.*

The Court found this key point inescapable given the cases that the court of appeals relied upon in reaching its holding. *General Electric III*, 362 F. Supp. 2d at 335 (citing *General Electric II*, 360 F.3d at 192-93). For example, the court of appeals relied in significant part on *McNary*, a pattern and practice case challenging INS's administration of certain immigration law provisions. In *McNary*, the Supreme Court held that such a pattern and practice claim cleared a jurisdictional hurdle analogous to section 113(h). *See McNary*, 498 U.S. at 492. Because the Supreme Court allowed such a claim to proceed in

McNary, the court of appeals reasoned, GE should be permitted to proceed with its claim here as well. *See General Electric II*, 360 F.3d at 193. Bound by the court of appeals's decision to remand GE's pattern and practice claim, this Court thus rejected EPA's argument that GE's facial and pattern and practice challenges were exactly the same. *General Electric III*, 362 F. Supp. 2d at 334-36. At the time of the Court's decision, GE had not yet been able to develop the factual record to support its claim that EPA's administration of section 106 denies PRPs procedural due process in fact, even if the statute does not do so in theory. The Court, therefore, permitted GE to proceed with discovery on that claim.

Discovery lasted over two years, closing in August 2007. During the course of discovery, the Court issued rulings on motions to compel in September 2006 and February 2007. *See General Electric v. Johnson*, No. Civ.A.00-2855, 2006 WL 2616187 (D.D.C. Sept. 12, 2006) (*General Electric IV*); *General Electric v. Johnson*, No. Civ.A.00-2855, 2007 WL 433095 (D.D.C. Feb. 5, 2007) (*General Electric V*). The parties produced tens of thousands of documents, conducted numerous fact and expert depositions, and exchanged reports and rebuttal reports for six experts. GE Memorandum in Support of its Motion for Summary Judgment ("GE Mem.") at 9-10. The factual record in this case is now, to put it bluntly, extensive.

Before the Court at this time are the parties' cross-motions for summary judgment based on that record. The crux of GE's argument is that EPA's administration of section 106 violates the Due Process Clause because, applying the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), section 106 as admi-

nistered deprives PRPs of protected liberty and property interests without a hearing, and because PRPs are *forced to* comply with UAOs, thereby offending *Ex parte Young*, 209 U.S. 123 (1908). EPA counters that GE has not suffered the pre-hearing deprivations it alleges and that such deprivations do not require greater process than EPA already provides consistent with CERCLA. EPA further argues that an Article III court conducts *de novo* review of penalties available for UAO noncompliance before any penalties can attach, thereby curing any coercive practices allegedly undertaken by EPA.

LEGAL STANDARD

Summary judgment is proper when the pleadings and evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party may successfully support its motion by "informing the district court of the basis of its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The moving party may point to the absence of evidence proffered by the non-movant to succeed on summary judgment. *See Celotex*, 477 U.S. at 322. Where, as here, the Court would be the trier of fact if the case were to proceed to trial, "the 'Court is not confined to deciding questions of law, but also may . . .

draw a derivative inference from undisputed subsidiary facts, even if those facts could support an inference to the contrary, so long as the inference does not depend upon an evaluation of witness credibility.'" *OAO Alfa Bank v. Ctr. for Public Integrity*, 387 F. Supp. 2d 20, 39 (D.D.C. 2005) (quoting *Cook v. Babbitt*, 819 F. Supp. 1, 11 & n.11 (D.D.C. 1993)); *see also Ramallo v. Reno*, 931 F. Supp. 884, 888 (D.D.C. 1996).[4]

ANALYSIS

I. Applicability of *Salerno*.

EPA argues that the standard from *United States v. Salerno*, 481 U.S. 739 (1987), should apply to GE's pattern and practice claim. EPA Memorandum in Support of its Motion for Summary Judgment ("EPA Mem.") at 17-19. Under *Salerno*, a plaintiff facially challenging a statute's constitutionality must establish that the statute is unconstitutional in every application. *Salerno*, 481 U.S. at 745. Notwithstanding some debate within the Supreme Court on this "no set of circumstances" prong of *Salerno*, *see City of*

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[4] Discovery has closed in this case and the factual record is complete. At the motions hearing before this Court on October 14, 2008, counsel for GE and EPA recognized that some "details" of the factual record remain in dispute. *See* Transcript of Motions Hearing ("Tr.") at 75-77, 89-91. But neither counsel maintained that these disputes would stand in the way of summary judgment. Indeed, both counsel stated that the disputed facts are not material. Moreover, both counsel recognized that the legal and factual issues in this case are not well-suited for resolution at trial. *See* Tr. at 75 ("I'm not sure the Court is ever going to have much more than it has right now."); *id.* at 89-90 ("[W]ell, is there a need for a factual trial here[?] [T]he nightmare of continuing this already long proceeding much longer, I think there is no need. . . .").

Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999), the D.C. Circuit continues to apply *Salerno* to facial challenges based on statutory text. *See Nebraska v. EPA*, 331 F.3d 995, 998 (D.C. Cir. 2003); *Chemical Waste Mgmt. v. EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995). Indeed this Court did so earlier on GE's textual challenge to CERCLA. *See General Electric III*, 362 F. Supp. 2d at 343-44. EPA argues now that GE's pattern and practice claim is tantamount to a facial challenge, and that the remedy GE seeks through the present claim—a remedy "that would apply universally to EPA's conduct"—is no different than the remedy GE sought in the facial challenge this Court considered (and rejected) previously. EPA Mem. at 17. EPA assures this Court that other federal courts apply *Salerno* to similar facial challenges to agency rules and policies. Therefore, EPA argues, *Salerno* should apply to GE's pattern and practice claim just as it applied to GE's previously-rejected facial claim based on the text of CERCLA.

The Court will not apply the *Salerno* standard to GE's pattern and practice claim.[5] *Salerno* applies to challenges based on hypothetical applications of a statute, not to challenges based on the particular facts of a case. *See Salerno*, 481 U.S. at 745 & n. 3, *Reno v. Flores*, 507 U.S. 292, 300-01 (1991) (applying *Salerno* because plaintiffs did "not challenge [an INS regulation's] application in a particular instance; [the regulation] had not yet been applied in a particular instance-because it was not yet in existence-when [plaintiffs'] suit was brought."). But GE's challenge here does not hypothesize how section 106 could be

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[5] The Court previously indicated, but did not decide, that *Salerno* might not apply to GE's pattern and practice claim. *See General Electric III*, 362 F. Supp. 2d at 343 & n. 9.

applied in the abstract. Rather, GE's pattern and practice claim is based on how EPA actually administers section 106. GE supports its claim—drawn from an extensive record after considerable discovery—with evidence about its own experiences and the experiences of other PRPs, including a raft of deposition testimony, expert reports, and EPA manuals. GE's claim is therefore more analogous to the *McNary* line of cases, which involved a pattern and practice claim based on INS's actual administration of the SAW provisions of the Immigration Reform Control Act. *See McNary*, 498 U.S. at 487-90. No court in that case—beginning with the District Court and ending with the Supreme Court—even cited to *Salerno*. This is not the type of generally-discouraged facial challenge to the text of a statute to which *Salerno* is generally applied, *See General Electric III*, 362 F. Supp. 2d at 343 n.9, and hence the Court will not apply *Salerno* to GE's pattern and practice claim, which has already been distinguished from a pure facial challenge.

II. Standing

EPA next argues that GE lacks standing to raise injuries based on noncompliance with a UAO.[6] See EPA Reply Memorandum in Support of its Summary Judgment Motion ("EPA Rep.") at 9-11. Standing "requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability." *Lance v. Coffman*, 549 U.S. 437, 439, (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). Here, EPA focuses on injury in fact. EPA points out that GE has complied with every

[6] EPA does not argue that GE lacks standing to challenge EPA's pattern and practice of issuing UAOs as unconstitutionally coercive under *Ex parte Young*.

UAO it has been issued but that GE nevertheless concentrates its *Mathews v. Eldridge* analysis, discussed *infra* at § IV, on deprivations triggered by *noncompliance* with a UAO. EPA argues that "[i]f such injuries never occur to GE because GE never disobeys a UAO, then GE does not have standing to base a due process challenge upon them." EPA Rep. at 11.[7]

The injuries relevant to standing are not, as EPA asserts, injuries arising from an act of noncompliance. The thrust of GE's argument is that EPA's administration of section 106 so amplifies the risks and costs of noncompliance that no rational PRP would choose not to comply with a UAO. The argument thus responds to this Court's holding in *General Electric III*, where the Court rejected GE's textual challenge to section 106 in part because a PRP theoretically can choose not to comply with a UAO. 362 F. Supp. 2d at 339. If a PRP chooses not to comply, EPA cannot compel compliance without judicial intervention, so a PRP can always obtain a pre-deprivation hearing. *Id.* The Court recognized, however, that if PRPs are "deprived of any meaningful choice to refuse to comply with [a UAO], that might pose a different situation in assessing whether a deprivation of property has occurred." *Id.* Responding to the Court's caveat, GE now points to noncompliance-based deprivations—like a PRP's decreased market value—as evidence that PRPs are effectively forced to comply with UAOs. Moreover, even if PRPs are not forced to comply, GE uses noncompliance-based

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[7] This standing argument is distinct from a different challenge by EPA to GE's standing to assert a pattern and practice claim at all, which the Court previously rejected. *See General Electric III*, 362 F. Supp. 2d at 336-37.

deprivations as *evidence* that PRPs suffer pre-hearing deprivations once a UAO is issued, no matter what they choose to do.

The injury inquiry for standing is limited to whether GE has "set forth" sufficient "specific facts" to support its claim that EPA deprives GE of liberty or property without due process by issuing UAOs to GE. *See Lujan*, 504 U.S. at 561 (establishing a plaintiff's burden of establishing standing at the summary judgment stage).[8] EPA does not dispute GE's showing that EPA has issued 68 UAOs to GE and that GE has complied with all of them. *See* EPA Memorandum in Opposition to GE's Summary Judgment Motion ("EPA Opp.") at 20. And EPA concedes that "GE [can] establish injury for standing purposes where it *does* comply with a UAO and incurs response costs." EPA Rep. at 11 (emphasis in original). Therefore, GE has standing to bring this pattern and practice claim and may rely on noncompliance-based injuries to the extent it uses such injuries to establish that PRPs are deprived of a meaningful choice not to comply with a UAO or that PRPs suffer pre-hearing deprivations regardless of whether they comply.

III. *Ex Parte Young*

GE's first claim is that EPA's pattern and practice of administering section 106 violates procedural due process under *Ex parte Young*, 209 U.S. 123 (1908). Under *Ex parte Young* and its progeny, a statutory

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[8] Courts do not assess the merits of a plaintiff's claim when considering standing. *See Emergency Coalition to Defend Educ. Travel v. Dep't of Treasury*, 545 F.3d 4, 10 (D.C. Cir. 2008) ("In considering standing, we must assume the merits in favor of the party invoking our jurisdiction."). Therefore, at this stage of the analysis, the Court presumes that the deprivations GE asserts can form the basis for a due process claim.

scheme that imposes penalties on those seeking judicial review is unconstitutional if "the penalties for disobedience are by fines so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation." *Id.* at 147. Statutes prescribing significant penalties for violators are not *per se* unconstitutional, however. Rather, if a party challenging a penalty or a statute in "good faith" may not be penalized, then the statute may be constitutional under *Ex parte Young*. *See Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964). Here, under section 106(b)(1), a district court must review any penalty EPA seeks for noncompliance with a UAO. The court may only impose penalties if a PRP has failed to comply "without sufficient cause"; moreover, even if the court finds that the noncomplying PRP lacks "sufficient cause," the court still has full discretion in deciding whether to impose a civil penalty, or punitive damages, and if so, in what amount. *See* 42 U.S.C. §§ 9601(b)(1), 9607(c)(3). Courts considering *Ex parte Young* challenges to sections 106 and 107 have held that the sufficient cause defense operates as a good faith safe harbor, adequately curing any constitutional problems that steep CERCLA fines and penalties could otherwise create. *See Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 391 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986); *United States v. Capital Tax Corp.*, Civ.A.No. 04-4138, 2007 WL 488084 at *6 (N.D. Ill. Feb. 8, 2007). Applying this reasoning in *General Electric III*, this Court rejected GE's facial *Ex parte Young* challenge based on the text of CERCLA's UAO provisions, although leaving room for GE to further

develop an *Ex parte Young* challenge in its pattern and practice case. *See* 362 F. Supp. 2d at 342-43.

GE's pattern and practice claim under *Ex parte Young* fails for the same reasons previously explained. GE points to four aspects of EPA's UAO policy that supposedly intimidate PRPs into compliance: EPA seeks maximum penalties for noncompliance; EPA seeks multiple penalties for violations at a single UAO site; EPA rejected Justice Department advice that EPA should impose a cap on daily penalties; and EPA labels noncomplying PRPs as "recalcitrant." But no matter what EPA arguably does or seeks, a *judge* ultimately decides what, if any, penalty to impose.[9] Indeed, courts routinely exercise their discretion in determining what kinds of daily or punitive penalties to impose for violations of section 106. *See, e.g.*, *United States v. Capital Tax Corp.*, Civ.A.No. 04-4138, 2007 WL 2225900 at *13 (N.D. Ill. Aug. 1, 2007) (awarding $750 daily penalty and zero punitive damages); *United States v. Barkman*, Civ.A.No. 96-6395, 1998 WL 962018 at *18 (E.D. Pa. Dec. 17, 1998) (awarding $100 daily penalty).[10]

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[9] In a footnote, GE cited to three cases for the proposition that a statute may run afoul of *Ex parte Young* even if a penalty scheme is not automatic or self-executing. *See* GE's Memorandum in Opposition to EPA's Summary Judgment Motion ("GE Opp.") at 46 n.29 (citing *Chicago, M. & St. P. Rwy. Co. v. Polt*, 232 U.S. 165, 167-68 (1914); *Missouri Pac. Rwy. Co. v. Tucker*, 230 U.S. 340, 346-51 (1913); *Missouri Pac. Rwy. Co. v. Nebraska*, 217 U.S. 196, 207-08 (1910)). But at the motions hearing, counsel for GE conceded that none of these cases stand squarely for that proposition. *See* Tr. at 48.

[10] GE cites to *United States v. Tannery*, Civ.A.No. 91-693, 1992 WL 1458802 (N.D. Tex. Dec. 7, 1992), and *United States v.*

Nor does EPA's pattern and practice regarding UAOs prevent federal courts from exercising their discretion. In *General Electric III,* this Court affirmed as satisfying due process requirements CERCLA's judicial review provisions, which provide for *de novo* review of liability and review of remedy selection under an "arbitrary and capricious" standard. 362 F. Supp. 2d at 341-42. Now, GE argues that EPA's pattern and practice of compiling the administrative record creates an incomplete basis for a reviewing judge's decision, thereby impairing the judge's discretion. Specifically, GE argues that EPA's practice of excluding irrelevant and pre-decisional deliberative documents from the administrative record results in a skewed record. *See* GE Mem. at 57. But irrelevant

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LeCarreaux, Civ.A.No. 90-1672, 1992 WL 108816 (D.N.J. Feb. 19, 1992), to support its argument that courts do not exercise their judgment in awarding punitive or treble damages. GE Rep. at 32-33 & n.34. In *Tannery*, the court noted in a one-page opinion that the defendant had repeatedly refused to participate in proceedings before the court. Indeed, the court noted that "even if the summary judgment were not to be granted, the court would grant default judgment in favor of plaintiff as a sanction . . . ." 1992 WL 1458802 at *1. Similarly, in *LeCarreaux,* the court noted that because it had "received no opposition," it adopted the recommendation of a Magistrate Judge, who himself adopted the government's proposed findings of fact and conclusions of law in their entirety. 1992 WL 108816 at *1. Unsurprisingly, the government proposed the maximum damages allowed under CERCLA. To be sure, both cases represent instances of courts adopting EPA's suggested treble and punitive damages. But in each case, the defendants either failed to oppose EPA's requested damages or altogether failed to participate in the enforcement proceedings. These cases, therefore, are unique in both the brevity of their analysis and the lack of engagement displayed by the defendants, and do not represent generally a failure by the courts to exercise discretion regarding the imposition of penalties for section 106 violations.

documents *should* be excluded from the record—the record should only include documents that the agency "directly or indirectly considered." *See Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006); *see also James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996). And "an agency generally may exclude material that reflects internal deliberations." *Maritel*, 422 F. Supp. 2d at 196. Moreover, GE has not demonstrated that EPA actually has a pattern and practice of excluding documents that should be *included* in the record. Although GE has provided examples from two sites where an administrative record was arguably incomplete, two anecdotal examples do not form a pattern and practice. *Cf. Coser v. Moore*, 739 F.2d 746, 751-52 (2d Cir. 1984); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). And even if the record was incomplete in those two instances, safeguards within CERCLA ensure that a reviewing court could have supplemented the record. *See* 42 U.S.C. § 9613(j)(1). The Court is not persuaded, then, that EPA abuses its stewardship of the administrative record and hence rejects GE's assertion that courts are prevented from exercising their discretion in awarding or denying penalties and fines.

Finally, GE argues that EPA has purposefully muddied the contours of the sufficient cause defense, thus keeping PRPs guessing whether they have sufficient cause in deciding not to comply with a UAO. To be sure, *Ex parte Young* problems may arise when the imposition of penalties turns on the interpretation of an imprecise legal standard. *See Solid State Circuits*, 812 F.2d at 391. GE contends that *Solid State Circuits* provided an "unambiguous call on EPA to provide the type of guidance necessary to provide the sufficient cause defense with . . . requisite

certainty." GE Mem. at 55.[11] GE argues that EPA has ignored this judicial command, choosing instead to keep the sufficient cause defense vague. *Solid State Circuits*, however, does not go as far as GE wishes. There, the Eighth Circuit recognized that because CERCLA had only recently been enacted, the term "sufficient cause" had not yet been developed by EPA or the courts. 812 F.2d at 391. The court noted that "as the EPA and the courts face concrete cost recovery and treble damage cases, section 107(c)(3) of CERCLA [i.e., the sufficient cause defense] will develop accordingly." *Id.* at 391 n.11. In the meantime, the court bypassed potential *Ex parte Young* problems by shifting the burden--rather than requiring the noncomplying PRP to show that it had sufficient cause not to comply, the court required EPA to show that the challenging PRP *lacked* sufficient cause. *Id.* at 392. Although the court noted that EPA could have avoided this kind of burden-shifting by enacting detailed regulations regarding the sufficient cause defense, the court did not issue the kind of "unambiguous call" that GE suggests. In the end, courts, not agencies, provide the conclusive interpretations of imprecise legal terms like "sufficient cause." *See Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Indeed, since *Solid State Circuits*, district courts have given meaning to the term. *See, e.g., Capital Tax Corp.*, 2007 WL 2225900 at *13; *Barkman*, 1998

[11] GE's citation to *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999), in support of this same point is unhelpful. *Pearson* considered an agency's failure to articulate reasons for taking action, not an agency's failure to give definitional content to an analogous "safe harbor" term. GE does not argue that EPA routinely fails to articulate reasons for issuing UAOs.

WL 962018 at *17. Hence, while EPA's unwillingness to issue guidance regarding the meaning of sufficient cause may be poor policy, it does not constitute a coercive pattern and practice. In sum, GE has not demonstrated that EPA practices—whether considered individually or together—are unconstitutionally coercive under *Ex parte Young*, and that due process challenge must accordingly fail.

IV. *Mathews v. Eldridge*

That brings us to the primary due process challenge GE asserts, which must be assessed within the framework of *Mathews v. Eldridge*. Both EPA and GE propose broad rules for certain categories of deprivations or government actions. But courts approach due process claims with scalpels, not cleavers. *See Hannah v. Larche*, 363 U.S. 420, 442 (1960) ("'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts."). Moreover, the parties' proposed rules are not adequately supported by the cases they cite, and hence the Court will not adopt them.

GE argues that due process requires a trial-type hearing for non-emergency, "adjudicatory" agency decisions. GE Mem. at 10; GE Reply Memorandum in Support of its Summary Judgment Motion ("GE Rep.") at 23. GE insists that this Court held in *General Electric IV* that issuance of a UAO is an adjudicatory decision. *See* 2006 WL 2616187 at *15 n.3. Leaving aside whether issuance of a UAO is "adjudicatory," GE's argument fails because it is a legal proposition without legal support. Certainly, adjudicative decisions require more individualized process than do rule-making decisions. *See United States v. Fla. East Coast Ry.*, 410 U.S. 224, 244

(1973). And, to be sure, some cases contain dicta suggesting that the more an agency's decision resembles a judicial decision, the more the agency's procedures should resemble judicial procedures. *See, e.g.*, *Hannah*, 363 U.S. at 442; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-34 (1982). But GE has not cited to any cases holding that trial-type hearings are *required* for adjudicatory decisions, and this Court therefore will not adopt GE's proposed rule.

EPA, on the other hand, argues that "consequential" deprivations cannot form the basis for a due process challenge at all. EPA Opp. at 9-10. EPA points out that some of the deprivations GE alleges only occur because the marketplace values a PRP less after EPA issues a UAO to that PRP. In support of its proposed rule, EPA relies on *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), and *Blum v. Yaretsky*, 457 U.S. 991 (1982). *O'Bannon* rejected a claim by nursing home residents that they were entitled to a hearing before the government decertified a nursing home. Once the government decertified the home, residents could no longer use their government benefits there. The Court reasoned that the residents did not have a due process claim because they were only incidentally affected by the government's decision. 447 U.S. at 787. Unlike the incidentally-affected residents in *O'Bannon*, however, UAOs are issued directly to PRPs, who are themselves affected by government action. *Blum* rejected the claim of Medicaid recipients that they were entitled to greater process before a state-subsidized hospital discharged them. The Court reasoned that the recipients did not have a due process claim because actions by the hospital did not constitute "state action." 457 U.S. at 1004-05. But UAOs are issued by EPA itself and indisputably constitute state

action. Hence, neither *O'Bannon* nor *Blum* is applicable here.

Connecticut v. Doehr, 501 U.S. 1 (1991), on the other hand, *does* apply, and it requires this Court to reject EPA's argument. In *Doehr*, a statute provided for *ex parte* prejudgment attachment of real estate without notice to the affected party. The Supreme Court noted that attachment "clouds title [and] impairs the ability to sell or otherwise alienate the property" and then held that these "consequences" were sufficient to merit due process protection. *Id.* at 11-12. *Doehr* therefore settles the question whether consequential injuries may warrant due process protection, even if courts must carefully assess whether any particular consequential deprivation is actionable.

Finally, EPA argues that mere "diminution in value" does not give rise to a due process claim. EPA Mem. at 24-25. EPA cites only to *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), in support of this proposition. In *Andrus*, the Supreme Court rejected a takings claim after the government banned the sale of eagle feathers, reasoning that "loss of future profits . . . provides a slender reed upon which to rest a *takings* claim." *Id.* at 65 (emphasis added). But GE does not bring a takings (i.e., just compensation) claim; it brings a due process claim. "'Property' as used in the Just Compensation Clause is defined much more narrowly than in the due process clauses." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996). *Andrus* is therefore inapposite and the Court will not adopt this EPA proposal, either.

Having rejected the parties' proposed easy solutions, the Court must apply the well-settled *Mathews*

v. Eldridge framework for due process claims. Under *Mathews*, courts balance the private interests, the governmental interests, and the risk of error to determine whether existing procedures are adequate to satisfy constitutional due process requirements. 424 U.S. at 335. Before reaching the balancing stage, however, this Court must determine that issuance of a UAO deprives PRPs of property or liberty. *See American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'").

PRPs arguably suffer deprivations without adequate due process under the section 106 UAO regime in three ways. First, the mere issuance of a UAO—before the PRP decides whether to comply—arguably impacts the PRP's stock price and brand value. Second, if a PRP chooses *not* to comply with a UAO, then the PRP arguably suffers increased damage to its stock price and brand value. Noncompliance also may impair a PRP's relationships with regulatory personnel and stakeholders, potentially depriving the PRP of a liberty interest. Finally, if a PRP chooses to comply with a UAO—and GE argues here that PRPs are *forced* to do so--then the PRP must incur the costs of clean-up. The parties agree that clean-up costs constitute a protected property interest; the parties disagree, however, on whether PRPs are forced to comply.[12]

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[12] GE also argues in its briefs that the cost of simply responding to a UAO deprives PRPs of a protected interest. *See* GE Mem. at 23-25. At the motions hearing, however, counsel for GE conceded that GE does not rely on the cost of responding as a deprivation under the *Mathews* analysis. *See* Tr. at 33-34.

A. *Mathews* Prong One

1. Deprivations at UAO Issuance

The parties dispute whether GE is required to show that a PRP suffers a deprivation when a UAO is issued or when a PRP elects not to comply with it. EPA contends that GE is required to show that PRPs suffer injuries at issuance. EPA Opp. at 12. GE argues that the relevant deprivations are those at noncompliance because the parties agree that there is a deprivation at compliance. GE Rep. at 12. Nevertheless, GE submits that even though it focused on costs at noncompliance, its expert, Dr. John Geweke, has established that "issuance of a UAO would cause an immediate deprivation, whether or not a PRP complied." *Id.* Issuance of a UAO arguably causes two kinds of property deprivations: (1) reduced stock price and increased cost of financing; and (2) damage to the PRP's brand value.

Neither stock price/cost of financing impacts nor brand value depletions are protected property interests upon mere issuance of a UAO. Damage to stock price and brand value could occur anytime any agency takes any action that the market interprets as adverse against a company. For example, if the Securities and Exchange Commission announced an investigation of a company for securities fraud, that company's stock price and brand value might suffer. The same would likely occur if the Food and Drug Administration announced that it was recalling a company's drug because of health concerns. But surely neither of those situations triggers due process concerns. Indeed, announcement of the very pre-issuance process that GE seeks would adversely impact a PRP's stock price and brand value under GE's argument. The Court would be inviting a host of

unfounded due process claims were it to conclude that stock price and brand value damage upon mere issuance of a UAO constitute actionable property deprivations. Counsel for GE recognized the need for line-drawing at the October 14, 2008 motions hearing before the Court, but counsel proposed drawing the line at *noncompliance*, not at *issuance*. Tr. at 17-19. Accordingly, GE has not shown that PRPs suffer any deprivation of a protected property interest simply upon issuance of a UAO.

2. Deprivations if a PRP Does Not Comply

GE argues that PRPs are deprived of property and liberty if they elect not to comply with a UAO. GE points to three kinds of deprivations at noncompliance. GE again asserts that PRPs suffer injuries relating to their stock price and cost of financing. GE also reprises its argument that PRPs incur brand value damage. Finally, GE argues that PRPs' relationships with stakeholders and EPA itself are impaired if PRPs do not comply, thereby depriving PRPs of a protected liberty interest.

As a threshold matter, GE's stock price/cost of financing and brand value reduction arguments do not suffer from the same line-drawing problems at the noncompliance stage that doomed them at the issuance stage. As counsel for GE put it, "the axe falls" at noncompliance. *See* Tr. at 17. That is true because a PRP is normally branded a recalcitrant actor once it decides not to comply—a label that enhances the harm to stock price and brand value, and also supposedly exposes PRPs to greater penalties, increases permitting times, bars PRPs from certain EPA programs, and impacts PRPs' relationships with certain stakeholders. The deprivations are thus both qualitatively and quantitatively different

upon noncompliance than upon issuance of a UAO. These differences are sufficient to distinguish the impact of noncompliance with a UAO from the theoretical impacts of other types of adverse government action.

GE bases its stock price/cost of financing argument on the expert reports from Drs. John Geweke and Jason Johnston. Dr. Geweke, faced with a dearth of data regarding the impact of noncompliance on stock price, instead examines the impact of "special notice letters" on stock price for 290 publicly-traded companies in 1994. Geweke Report at ¶ 13. Dr. Geweke also looks at the impact of special notice letters on bond yields for 89 companies from 1995 to 1998. *Id.* EPA usually sends special notice letters to PRPs to initiate settlement discussions regarding clean-up of a hazardous site. EPA's Statement of Facts ("EPA SOF") at ¶¶ 19-20. If settlement fails, then EPA normally issues a UAO. *Id.* at ¶ 27. Therefore, Dr. Geweke concludes, special notice letters associate a PRP with a contingent liability and negatively impact stock price and cost of financing. Geweke Report at ¶ 6. Using two multivariate regression analyses, Dr. Geweke then extrapolates what the impact on stock price and cost of financing would be if a PRP chose not to comply with a UAO. Logically, contingent liabilities associated with noncompliance are greater than those associated with a special notice letter because EPA may seek treble and punitive damages if a PRP chooses not to comply. Therefore, Dr. Geweke concludes that "[a] firm's decision not to comply with a UAO . . . subjects the firm to a loss in market value that is 5.9 times greater than its loss in market value arising from a special notice letter." *Id.* at ¶ 19. He calculates that the average decrease in market value based on noncompliance would be $76.4

million, compared with an average $12.9 million decrease in market value based on receipt of a special notice letter. *Id.* at ¶ 158 & Figure 7.

Dr. Johnston takes a different approach. Like Dr. Geweke, Dr. Johnston does not have sufficient data to analyze the impact of noncompliance on stock price. Rather than focusing on special notice letters, however, Dr. Johnston also looks at the impact of other "negative environmental events" on a company's stock price, such as EPA's filing of a complaint against a company or a company's settlement of a Justice Department lawsuit. *See* Johnston Report at ¶¶ 34-37. Dr. Johnston does not conduct regression analyses. Instead, he surveys four existing "event studies" that test the relationship between negative environmental news and a stock price decrease. *See id.* at ¶ 29 (explaining the event study methodology). Dr. Johnston concludes that these event studies provide "strong evidence" that noncompliance with a UAO will result in "statistically significant negative abnormal stock market returns" for a targeted PRP. *Id.* at ¶ 33. Because Dr. Johnston does not conduct his own event study, he does not project the size of a potential noncompliance-based stock price decrease.

EPA asserts that Dr. Geweke's analysis fails under the standard governing the admissibility of expert opinion evidence. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The proffering party must demonstrate the admissibility of expert testimony by a preponderance of the evidence under *Daubert* and its progeny. *See Meister v. Med. Eng'g Corp.*, 267 F.3d 1123, 1127 n.9 (D.C. Cir. 2001). EPA first challenges Dr. Geweke's methodology. EPA argues that he should have considered empirical evidence concerning

actual instances of UAO noncompliance rather than conducting a "counterfactual" analysis based on the impacts of special notice letters. The Court certainly agrees that analysis of hard data is generally preferable to projected data, and would be here. But empirical evidence concerning actual instances of UAO noncompliance is scarce because very few publicly-traded firms have chosen not to comply with UAOs. EPA's own rebuttal expert, Dr. Donald Siegel, testified that making inferences based on related events was appropriate absent sufficient data. *See* Deposition of Donald Siegel at 173:19-175:3. Moreover, regression analyses are commonly used as evidence in cases requiring "extrapolati[on] from a sample of known data." *League of United Latin Amer. Citizens v. Perry*, 548 U.S. 399, 467 (2006); *see also* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression,* in *Reference Manual on Scientific Evidence* 181-85 (Federal Judicial Center 2d ed. 2000). Therefore, a regression analysis is an acceptable method of demonstrating the impact of UAO noncompliance on stock price absent sufficient empirical data.

EPA next questions the assumptions underlying Dr. Geweke's analysis. *See* EPA Opp. at 13-14. EPA highlights three supposedly flawed assumptions: that firms that are issued UAOs at multiple sites will decide not to comply with any UAO; that firms that choose not to comply with a UAO will be assessed maximum daily penalties for a five-year period *(i.e.,* that EPA will not bring an enforcement action until the statute of limitations is set to expire); and that the markets do not discount contingent liabilities based on the likelihood of enforcement, the chance that a PRP will successfully defend an enforcement action, or the possibility that a court will impose a

smaller penalty than EPA requests. Although not without some force, none of these alleged flaws is sufficient to disqualify Dr. Geweke's report. His model does calculate potential impacts if a PRP receives multiple UAOs and does not comply with any of them, but he reaches his main conclusion—that the average decrease in market value based on UAO noncompliance is $76.4 million—by assuming that a PRP decides not to comply with a single UAO. *See* Geweke Report at ¶ 158. Moreover, EPA does not meaningfully dispute GE's assertion that "[i]t is the government's practice in bringing suit for UAO noncompliance to seek the statutory maximum in penalties and treble damages." *See* GE's Statement of Undisputed Facts ("GE SUF") at ¶ 125 and EPA's Response to GE SUF at ¶ 125. While the Court is persuaded that EPA has a policy of seeking maximum damages, GE has not offered any evidence to suggest that EPA routinely waits as long as possible before filing a cost recovery or enforcement action. The Court, then, will not hazard a recalculation of Dr. Geweke's formula. But it is clear that shorter delays in filing cost recovery or enforcement actions would result in smaller potential penalties, smaller contingent liabilities, and, therefore, an average market value reduction of less than $76.4 million. Similarly, while Dr. Geweke specifically acknowledges that the market may discount potential liabilities based on possible defenses or a court's decision to impose smaller penalties than EPA seeks, he argues that "the difference would be one only of magnitude." Geweke Report at ¶ 27. True enough, but because he did not attempt to quantify how much markets would discount potential liabilities, his $76.4 million calculation is necessarily too high. The question at this stage of the inquiry, however, is whether a depriva-

tion exists, not how large that deprivation is. *See Sullivan*, 526 U.S. at 59. Although imperfect, Dr. Geweke's analysis demonstrates that PRPs are deprived of *some* portion of the market value of their stock if they decide not to comply with a UAO.

EPA also asserts that Dr. Johnston's report fails the *Daubert* standard. EPA Opp. at 14-15. EPA again contends that Dr. Johnston should have examined hard data rather than similar "negative environmental events." But Dr. Johnston, like Dr. Geweke, could not examine actual instances of noncompliance with UAOs because there are not enough to comprise a reliable data set. EPA next argues that Dr. Johnston should have conducted his own event study rather than relying on previously-published ones. That argument has merit. Although none of the cases EPA cites support its argument that *Daubert* requires experts to conduct their own event studies,[13] Dr. Johnston's reliance on other economists' analyses of other (albeit comparable) events certainly diminishes the probative value of his expert report. Dr. Johnston equates UAO noncompliance to these other events—such as EPA's announcement of a settlement or a newly-filed lawsuit—by reasoning that "UAOs are 'one of the primary enforcement tools to obtain a . . . response by PRP's,' and are used to 'provide an incentive for PRP's to settle' or to 'force commencement of work at the site when settlement cannot be reached.'" Johnston Report at ¶ 32 (quoting USEPA, OSWER Directive No. 9833.0-1a-3 (March 1990)) (ellipsis in original). But Dr. Johnston does not explain *why*

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[13] *See* EPA Opp. at 15 (citing *In re N. Telecom Ltd. Secs. Litig.*, 116 F. Supp. 2d 446 (S.D.N.Y. 2000); *Garay v. Mo. Pac. R.R.*, 60 F. Supp. 2d 1168 (D. Kan. 1999); and *In re Oracle Secs. Litig.*, 829 F. Supp. 1176 (N.D. Cal. 1993)).

UAOs are like any of the specific events that the other event studies examine. His conclusion—that negative environmental events are associated with large stock market decreases and that a UAO is a negative environmental event—is equally vague. Thus, Dr. Johnston's report largely duplicates Dr. Geweke's conclusions, only in a more general and imprecise way. The Court will not give significant weight to vague, cumulative evidence. *See* Fed. R. Evid. 403. Hence, the Court finds that Dr. Johnston's report does not advance GE's argument that noncompliance with a UAO causes a decrease in stock price.

The second proffered deprivation is GE's contention that a PRP's brand asset is damaged if it does not comply with a UAO. Intangible assets, like a brand name, may receive due process protection. *See Delaware, Lackawanna & W. R.R. Co. v. Pennsylvania*, 198 U.S. 341, 359 (1905). GE again relies on Dr. Johnston, who, without the benefit of adequate data, once more offers a general, conclusory opinion:

> For firms that have made substantial investments in establishing a corporate brand name for strong environmental performance, events that weaken the firm's brand name as an environmentally responsible actor cause a definite and potentially large decrease in the value of the corporate environmental brand asset . . . .

Johnston Report at ¶ 15. This time, Dr. Johnston does not apply any scientific methodology to test his conclusion. His report, however, is salvaged because no one disputes his conclusion. Not even Dr. Siegel, EPA's rebuttal expert, takes issue with it. *See, e.g.*, Siegel Dep. at 70:11-70:14, 72:10-72:16, 73:6-73:10, and 79:13-79:17. More controversial is how *much* noncompliance with a UAO decreases the value of the

brand asset. While Dr. Johnston opines that the decrease is "potentially large," EPA correctly points out that Dr. Johnston has no data to support his conclusion. But, again, at this stage of the *Mathews* analysis, only the *existence* of a pre-hearing deprivation matters, not its magnitude. *See Sullivan*, 526 U.S. at 59. Therefore, although Dr. Johnston's report does not help the Court assess how much noncompliance impacts brand value, his report, and Dr. Siegel's response to it, sufficiently demonstrates that PRPs are deprived of a protected property interest—the value of their brand—when they do not comply with a UAO.

Finally, GE argues that PRPs suffer pre-hearing liberty deprivations under the D.C. Circuit's "reputation-plus" standard. This standard has its origins in *Paul v. Davis*, 424 U.S. 693 (1976), where the Supreme Court "recognized the serious damage that could be inflicted by branding a government employee as 'disloyal,' and thereby stigmatizing his good name." *Id.* at 706. The Court noted, however, that it had "never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process *absent an accompanying loss of government employment.*" *Id.* (emphasis added). Under the D.C. Circuit's "reputation-plus" standard, collateral effects accompanying reputational injury must be "sufficiently formal or sufficiently broad" to merit due process protection. *See Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1506 (D.C. Cir. 1995); *see also Kartseva v. Dep't of State*, 37 F.3d 1524 (D.C. Cir. 1994) (explaining that a plaintiff could only succeed under the reputation-plus standard if she showed reputational damage that "automatically exclud[ed] her from a definite range of employment

opportunities" or that "broadly preclud[ed] her from continuing in her chosen career").

Collateral consequences are "sufficiently formal or sufficiently broad" when the reputation-injuring statement automatically triggers some adverse effect or precludes the injured party from pursuing chosen categories of activities in a way "equivalent in every practical sense to formal debarment." *See Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643-44 (D.C. Cir. 2003). For example, in *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001), the court considered the Anti-Terrorism and Effective Death Penalty Act, 8 U.S.C. § 1189, which automatically bars designated "foreign terrorist organizations" from holding bank accounts or receiving material support. The court held that an organization was entitled to process before the State Department could issue a "foreign terrorist organization" designation. *Id.* at 203-04. Similarly, in *Old Dominion Dairy Products, Inc. v. Sec'y of Defense*, 631 F.2d 953 (D.C. Cir. 1980), the Defense Department placed a written finding of "nonresponsibility" in a contractor's permanent file. Under the applicable acquisition regulations, a "responsibility" finding was required before a contract could be awarded. The court held that the contractor was entitled to process before being labeled as "nonresponsible" because the label would broadly, if not formally, preclude the contractor from obtaining other government contracts. *Id.* at 963.

GE argues that PRPs that do not comply with UAOs suffer reputational damage along with four collateral consequences: EPA seeks greater penalties for PRPs that routinely do not comply with UAOs; noncompliance could make PRPs ineligible for par-

ticipation in EPA programs like "Performance Track" and "Corporate Leaders"; noncompliance could lead to increased permitting times; and noncompliance impairs PRPs' relationships with some stakeholders. The Court can easily dispose of the latter three collateral consequences GE alleges, as they are entirely hypothetical. The few courts willing to speculate that a collateral consequence will follow only do so when the consequences are inevitable. *See, e.g.*, *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 & n.1 (D.C. Cir. 1993) (holding that labeling an airline "unsafe" would inevitably cost the airline future government contracts). The conclusion that noncompliance leads to greater permitting times, ineligibility for EPA programs, and impairment of relationships with stakeholders is not nearly so inescapable. Indeed, despite years of discovery, GE has not a single example of any of these collateral consequences occurring to any PRP.[14] Absent any *evidence* of such hypothetical collateral consequences, the Court will not assume they in fact occur.

Remaining, then, is GE's claim that noncompliance is accompanied by greater EPA penalties. The parties agree that EPA can and does take past UAO noncompliance into account when determining what penalties it will seek for a fresh instance of UAO noncompliance. *See* GE SUF at ¶ 132, EPA's Response to GE SUF at ¶ 132, and GE's Reply to EPA's Response to GE SUF at ¶ 132. But greater penalties are not an *automatic* consequence of

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[14] GE argues that "green" investors calculate that GE's overall environmental performance impacts its financial performance. GE SUF at ¶ 19. GE does not, however, provide any evidence to suggest that noncompliance with a UAO impacts PRPs' relationships with such investors.

noncompliance. *See* Deposition of Walter Mugdan at 228:4-12; Deposition of Kenneth Patterson at 91:4-92:22. Therefore, the logic of cases like *Nat'l Council of Resistance of Iran* does not apply. Rather, the question is whether the likelihood of greater penalties will "broadly preclude" PRPs from carrying out their chosen line of business. *See Kartseva*, 37 F.3d at 1527. And the answer is that they do not. An "unsafe" airline may be broadly precluded from receiving air transport contracts, *see Reeve*, 982 F.2d at 598; an "unreliable" military contractor may be broadly precluded from obtaining future contracts, *see Old Dominion*, 631 F.2d at 963; and a Russian translator with "counterintelligence concerns"—before the collapse of the Soviet Union—may be broadly precluded from a chosen career as a public employee, *see Kartseva*, 37 F.3d at 1529-30. Increased penalties do not have the same impact on a PRP—a typical PRP is not broadly precluded from its chosen line of business when it does not comply with a UAO, even if the penalties are substantial. To be sure, GE argues that UAOs can at times be so onerous as to put PRPs out of business. Geweke Report at ¶ 21. Accepting that assertion *arguendo*, it still does not rise to the level needed to trigger the reputation-plus standard: a "won some and lost some" record is not "remotely close" to "broad preclusion." *See Trifax*, 314 F.3d at 644. Because GE has not pointed to "sufficiently formal or sufficiently broad" collateral consequences of being labeled a noncomplying PRP, then, noncompliance does not cause PRPs to suffer a liberty deprivation under the reputation-plus standard.

Still, GE has alleged sufficient pre-hearing, noncompliance-based deprivations for the Court to proceed to prong two of the *Mathews* analysis. Although GE has not pointed to a reputation-plus

liberty deprivation, GE has pointed to two deprivations of protected property interests resulting from noncompliance with a UAO: damage to stock price and damage to brand value. The Court discounts Drs. Geweke's and Johnston's conclusions with regard to the size of those deprivations, but the Court accepts their conclusions as to the existence of those deprivations.

3. Deprivations if a PRP Complies

The question before the Court is not whether the response costs a PRP incurs if it complies with a UAO are protected property interests under the Due Process Clause. The parties agree that they are. *See* EPA Mem. at 21. Rather, the question is whether PRPs have a meaningful choice not to comply with a UAO once it is issued. In rejecting GE's facial challenge to section 106 in *General Electric III*, the Court explained that:

> The ability of the PRP to choose, under the language of the statute, whether to comply with a section 106 order is key. Upon a refusal to comply with a section 106 order, EPA is powerless to deprive the PRP of property without judicial intervention. On the other hand, were the PRP to be deprived of any meaningful choice to refuse to comply with an order, that might pose a different situation in assessing whether a deprivation of property has occurred.

362 F. Supp. 2d at 339. GE argues that EPA's pattern and practice of administering section 106 does indeed deprive PRPs of a "meaningful choice" to refuse to comply with UAOs. Therefore, the argument goes, PRPs are denied the very safeguard the Court previously held necessary—the opportunity for a pre-

deprivation hearing by choosing not to comply. GE's argument raises two questions. First, as a legal matter, if a PRP is not unconstitutionally coerced under *Ex parte Young*, may it nonetheless be deprived of a meaningful choice not to comply? Second, if some lesser coercion standard does apply, are PRPs in fact deprived of a meaningful choice not to comply? The answer to both questions is no.

GE has not proposed any legal framework to analyze coercion other than the *Ex parte Young* standard. As discussed *supra*, GE has not demonstrated that EPA's pattern and practice of administering section 106 violates *Ex parte Young* by unconstitutionally intimidating or coercing PRPs into compliance whenever a UAO is issued. GE has not cited to any precedent suggesting that a statute or agency policy, although not unconstitutionally coercive under *Ex parte Young*, can still be sufficiently coercive so as to deny one a meaningful opportunity to elect not to comply. The Court will not invent a new "lesser coercion" legal framework from scratch. Therefore, GE's argument that PRPs are deprived of a meaningful choice--even if they are not coerced into compliance under an *Ex parte Young* analysis—fails as a matter of law.

GE's argument is belied by the facts as well. GE represented at both the motions hearing and in its brief that EPA achieves a near-perfect record of compliance with UAOs. *See* Tr. at 5; GE Mem. at 50-51. GE's expert, Dr. Rouhani, however, suggests that EPA's record reflects a modest rate of noncompliance. Of the 5,422 PRPs who were issued UAOs between 1982 and 2006 that he examined, there were 189 instances of PRPs not complying—a rate of 3.5 percent. *See* Rouhani Report at 6.52 & Table 8(a).

And of the 1,638 PRPs who have been issued UAOs most recently, there were 75 instances of noncompliance—a rate of 4.6 percent. *Id.* at Table 8(b). These rates of noncompliance mirror the kind of "acceptable rate of error" tolerated by courts, *see Shands v. Tull*, 602 F.2d 1156, 1160 (3d Cir. 1979) (holding that a four percent error rate constitutes "substantial compliance" with a statute), not the "remarkable record" of "self-confidence" GE claims, *see* Tr. at 29:9.

The costs of clean-up that follow compliance, paired with the pre-hearing stock price and brand value deprivations caused by noncompliance, demonstrate that PRPs suffer pre-hearing deprivations whether or not they comply. But because the Court will not invent a new and lesser legal standard for coercion under *Mathews*—and GE has not demonstrated that EPA's pattern and practice is unduly coercive under *Ex parte Young*—the Court holds that PRPs are not deprived of a meaningful opportunity not to comply. This conclusion is bolstered by GE's own expert, Dr. Rouhani, who demonstrates that instances of noncompliance are sufficiently numerous to suggest that PRPs are not, in fact, forced to comply.

B. *Mathews* Prong Two

GE has demonstrated that PRPs are deprived of at least some property interests whether or not they comply with a UAO, and hence the Court must proceed to the second prong of the *Mathews* analysis. At this stage, the Court must first identify the private interest impacted by government action, the government interest in avoiding additional pre-decision process, and the risk that the current process will result in error. *See Mathews*, 424 U.S. at 335. Once the Court has identified those three factors, it must weigh them against one another to

determine whether additional process is constitutionally required before EPA issues a UAO. *See id.*

The process that EPA now provides before issuing a UAO bears on the identification and balancing of these factors. Once EPA identifies a "Superfund" site, it searches for PRPs by issuing information requests and conducting interviews. EPA SOF at ¶ 5. PRPs are permitted to provide information regarding both liability and remedy selection. *Id.* at ¶ 6. EPA provides notice to potential PRPs through a "general notice" letter. *Id.* at ¶ 8. PRPs then again have the opportunity to respond to general notice letters and provide information regarding liability and remedy selection. *Id.* at ¶ 9. Before selecting a remedy, EPA solicits public comments and compiles an administrative record, which normally happens over the course of weeks or months. *Id.* at ¶¶ 13-14, 18. PRPs are, of course, permitted to contribute to that record. If the remedy selected is settlement—EPA's preferred remedy—then EPA either issues a "special notice letter" or provides other written notice to PRPs. *Id.* at ¶¶ 19-20. Settlement negotiations take a "significant period of time" and PRPs are normally represented by counsel. *Id.* at ¶¶ 21-22. PRPs are permitted to, and often do, challenge EPA's determinations regarding liability and remedy selection during the negotiation process. *Id.* at ¶ 23. Finally, at the end of this lengthy process and only if negotiation fails, EPA will normally issue a UAO.

1. Private Interest

The *type* and *length* of the pre-hearing deprivation inform the constitutional relevance of the private interest. *See City of Los Angeles v. David*, 538 U.S. 715, 717 (2003); *Mathews*, 424 U.S. at 341-42. Deprivations that can be recouped after a hearing—

like purely financial deprivations—are less significant than irreparable deprivations. *See David*, 538 U.S. at 717 (holding that a temporary deprivation of a car was more significant than a deprivation of money in the form of impoundment and towing fees). A substantial financial deprivation bearing collateral consequences—for example, an effect on a company's operations—is not purely financial and is a more significant private interest. *See Mathews*, 424 U.S. at 341-42. No matter the type of the deprivation, moreover, "there is a point at which an unjustified delay in completing a post-deprivation proceeding 'would become a constitutional violation.'" *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985)).

Here, the significance of the pre-hearing deprivation varies depending on whether or not a PRP complies with a UAO. GE relies on the expert opinion of Dr. Shahrokh Rouhani to establish the deprivations faced by PRPs who comply with a UAO. Dr. Rouhani obtained data regarding EPA's CERCLA enforcement activities from the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS"), an EPA database. Rouhani Report at ¶ ¶ 1.2, 4.1-4.4. Based on his assessment of that data, Dr. Rouhani opines that, on average, complying with a UAO costs a PRP $4 million. *Id.* at ¶¶ 2.1.3, 6.2-6.3.[15]

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[15] Dr. Rouhani also calculates the average costs if a PRP chooses not to comply with a UAO. Assuming that EPA cleans up a site itself, brings an enforcement action against the noncomplying PRP, and persuades a court to award punitive damages and the maximum daily fines for the average period of completion, Dr. Rouhani calculates that the average costs of

For the costs of noncompliance with a UAO, GE relies on the expert reports from Drs. Johnston and Geweke. As discussed earlier, neither expert report properly quantifies brand value reduction or market value decline. Dr. Johnston, who addresses brand value reduction, does not attempt to quantify how *much* brand value drops for an average noncomplying PRP. Dr. Geweke, who addresses market value decline, opines that PRPs suffer an average $76.4 million decline in market value if they do not comply with a UAO, but he acknowledges that markets may discount potential liabilities, thereby "lessen[ing] somewhat the immediate financial impacts of a decision not to comply with a UAO." Geweke Report at ¶ 27. Yet Dr. Geweke does not assess how *much* markets discount potential liabilities. Moreover, his $76.4 million figure is based on the *unfounded assumption* that EPA waits as long as possible before bringing cost recovery or enforcement actions. Therefore, the Court is left without a reliable quantification of the economic deprivations noncomplying PRPs suffer. Rather than dismissing the expert reports entirely, however, the Court is persuaded that noncomplying PRPs suffer a significant decrease in brand and market value, albeit something less than $76.4 million. The Court will proceed with the *Mathews* prong two assessment based on that estimate of the private interest impacted by noncompliance.

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noncompliance are more than $54 million. Rouhani Report at ¶ 6.3.5. But because PRPs receive a full judicial hearing before any of those costs may be imposed, those costs of noncompliance do not factor into an assessment of whether more process is needed before a UAO may be *issued*.

The deprivations that GE alleges are primarily financial ones. Financial deprivations are less troubling because money can be recouped in a post-deprivation hearing. *See David*, 538 U.S. at 717. But deprivations caused by UAOs are potentially so large—on average $4 million for complying PRPs and some substantial, unidentified amount for noncomplying PRPs—that they may have collateral effects. UAOs could put some PRPs out of business. *See* Geweke Report at ¶ 21. For other PRPs, UAOs may affect operations, like whether to bid for new projects or to hire additional employees. *See id.* at ¶ 25. Yet for other companies, like GE, UAOs are "not material to . . . financial positions, results of operations, or liquidity." *See* EPA SOF at ¶ 45 (quoting GE Annual Reports, 1997-2000). The variety of collateral effects, if any, precludes the Court from reaching a single conclusion about the significance of UAOs for all PRPs. Still, a general conclusion is possible: although the private interests are less constitutionally significant because they are primarily financial, they are sufficiently large and have enough potential collateral effects to constitute weighty private interests.

GE argues that PRPs are deprived of these private interests for lengthy periods of time. Under section 106(b), a complying PRP may seek reimbursement "upon completion of the required action." On average, it takes three years to fully comply with a UAO. Rouhani Report at ¶ 6.2. Moreover, GE argues, EPA claims the power unilaterally to delay "completion." In proceedings before the Environmental Appeals Board ("EAB"), the body that reviews section 106(b) reimbursement petitions, EPA has at times successfully argued that a petition should be dismissed because of a PRP's failure to obtain an EPA "certificate of completion." GE SUF at ¶ 91. In the current

proceedings, however, EPA contends—correctly—that the statute does not require an EPA determination that the clean-up is complete before a complying PRP may file a reimbursement petition. *See* 42 U.S.C. § 9606(b); EPA Response to GE SUF at ¶ 91. If a complying PRP believes that it has completed a clean-up but the EAB declines the PRP's reimbursement petition for failure to obtain a certificate of completion, the PRP may appeal the EAB decision to an Article III court. *See Employers Ins. of Wausau*, 52 F.3d at 662. There, the PRP can argue that the EAB made legal errors (like accepting EPA's argument that a certificate of completion was required) or factual errors (like finding the clean-up incomplete). Therefore, although Dr. Rouhani's conclusion that UAOs take, on average, three years to complete is persuasive, the Court is not persuaded that EPA can unilaterally delay reimbursement proceedings by refusing to issue a certificate of completion.

GE argues that PRPs are also indefinitely "left in limbo" if they choose not to comply with a UAO. EPA has two ways to enforce UAOs under CERCLA. First, EPA can bring an enforcement action against a noncomplying PRP. Enforcement actions must be brought within five years of a "violation." *See* 28 U.S.C. § 2462. Second, EPA can complete the UAO itself and file a cost recovery petition against the PRP. Cost recovery petitions must be filed within three years of completion for removal actions and within six years of completion for remedial actions. 42 U.S.C. § 9613(g)(2). GE argues that these statutes of limitations permit an unconstitutionally long deprivation because they are paired with a "removal or remedial action [that] may itself take years to complete" such that "the government may take its own sweet time before suing." *See* GE Mem. at 38-39

(quoting *Reardon v. United States*, 947 F.2d 1509, 1519 (1st Cir. 1991)). In *Reardon*, an as-applied challenge, the First Circuit held that the CERCLA statutes of limitations contributed to the unconstitutionality of a different section of CERCLA in a specific setting. 947 F.2d at 1521. But no court has rejected these CERCLA statutes of limitations in a *facial* challenge. Indeed, this Court denied GE's facial challenge to the statutes of limitations in *General Electric III*. *See* 362 F. Supp. 2d at 336. The Court invited GE to revisit this argument in its pattern and practice claim by presenting evidence that EPA indeed unreasonably delays enforcement proceedings. *Id.* But GE has not offered any evidence to suggest that EPA in fact delays enforcement or cost recovery proceedings. Therefore, the Court confirms its prior rejection of a challenge to the CERCLA statutes of limitations and hence also rejects GE's argument that PRPs are deprived of property for extended periods of time if they choose not to comply with a UAO.

In short, the relevant private interest at issue is primarily a financial one. The magnitude of the private interest depends on whether or not a PRP complies, and UAOs have collateral effects on operations for some PRPs but no material impact on others. While in theory a PRP could be deprived of that private interest for several years, GE has not demonstrated that EPA in fact routinely waits as long as the CERCLA statutes of limitations allow before bringing enforcement or cost recovery actions.

2. Government Interest

Two factors are paramount in identifying the government interest. The first is whether the government has "a special need for very prompt

action." *See Fuentes v. Shevin*, 407 U.S. 67, 91 (1972). The greater the government's need for prompt action, the greater the government interest in avoiding additional pre-deprivation process. *Id.* The second factor is the financial and operational cost of additional process and the need to conserve "scarce fiscal and administrative resources." *See Mathews*, 424 U.S. at 347-48. The cost of additional process will vary according to its nature. Whereas a full judicial hearing carries substantial financial and administrative costs, notice and an informal opportunity to be heard is far less burdensome. The cost of additional process also varies according to its volume. The more often the government is required to provide additional process, the greater the burden on the government. *See id.* at 348.

EPA lacks a "special need for very prompt action" in issuing UAOs under section 106 of CERCLA. *See Fuentes,* 407 U.S. at 91. To be sure, EPA may only issue a UAO upon a finding of "imminent and substantial endangerment to public health or welfare or the environment." 42 U.S.C. § 9606(a). Nonetheless, the parties agree that EPA does not issue UAOs in true emergency situations.[16] *See* GE SUF at ¶¶ 37-38. In true emergency situations, EPA cleans up a site itself and later files a cost recovery action. *Id.* at ¶ 38. EPA nevertheless argues that UAOs are more time-sensitive than wholly non-emergency situations—that is, UAOs occupy a gray area in between emergency and non-emergency situations. But GE responds that whatever the contours of that gray area, EPA's practices demonstrate that UAOs do not

[16] Whether or not "imminent and substantial" is synonymous with "emergency" as a legal matter is an issue this Court need not decide.

require "very prompt action." GE points to Dr. Rouhani's report, which demonstrates an average eight year lag-time between identification of a hazardous waste site and issuance of a UAO and a four year lag-time between remedy selection and UAO issuance. Rouhani Report at ¶ 6.1.3. Although EPA insists that it is busily investigating and negotiating during that lengthy period, Dr. Rouhani's report demonstrates that the government lacks a "special need for very prompt action" in issuing UAOs.

The second consideration is the cost of the additional process GE seeks. Although GE has not outlined exactly what that additional requested process is, GE argues that some sort of neutral decision-maker is required. *See* GE Opp. at 24-25. The "most obvious solution" in GE's view is a full judicial hearing before an Article III judge. *See* Tr. at 9:8-10:17. Judicial proceedings, however, are fraught with considerable expense and delay, and courts rarely import the judicial model into administrative decision-making. *See Mathews*, 424 U.S. at 348. Other methods of providing additional process are less costly and time-consuming. For example, courts have held that an administrative law judge ("ALJ"), *See Rosen v. NLRB*, 735 F.2d 564, 570 (D.C. Cir. 1984), and a detached "presiding officer" within an agency, *See Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1485 (D.C. Cir. 1989), are both adequate neutral decision-makers. Although the government has a high interest in avoiding the costs and delays of a full judicial hearing, it has a lower interest in avoiding the less formal process before an ALJ or agency presiding officer.

The cost of the additional process also depends on how often the government must provide it. *See Mathews*, 424 U.S. at 348. Between August 16, 1982 and May 25, 2006—a period of 285 months—EPA issued 1,705 UAOs to more than 5,400 PRPs. *See* Rouhani Report at ¶¶ 4.3, 6.5.2. On average, then, EPA has issued approximately six UAOs to nineteen PRPs every *month*[17]. Because EPA generally issues UAOs only when negotiations with a PRP have failed, most PRPs would contest the UAO through the pre-issuance hearing GE seeks. To be sure, EPA might issue fewer UAOs if more pre-issuance process were required. But because UAOs involve high stakes and complex technical judgments, any hearing before a neutral decision-maker would involve significant fiscal and administrative burdens; hence, even a fraction of the current monthly rate of UAO issuance would generate a substantial impairment of the government's interest measured in the financial and administrative costs of that additional process.

3. Risk of Error

Analysis of the risk of error is different for a pattern and practice claim than it is for either a facial or an as-applied challenge. Case law provides scant guidance, however, on just what that difference is. The few courts that have decided pattern and practice procedural due process claims have expounded little on the risk of error analysis. *See, e.g.*, *Haitian Refugee Ctr., Inc. v. Nelson*, 694 F. Supp. 864 (S.D. Fla. 1988), *aff'd* 872 F.2d 1555 (11th Cir.

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[17] Dr. Rouhani points out that UAOs have been issued more frequently in the past 15 years than they were for the first ten years. *See* Rouhani Report at 6.7. The Court's calculation, therefore, *underestimates* the number of UAOs EPA currently issues per month.

1989), *aff'd sub nom. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991). GE urges the Court to adopt the same kind of abstract approach that courts use in both facial and as-applied challenges. *See* Tr. at 42:5-42:11; GE Mem. at 48 (citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978)). Under this approach, courts "look generically at whether the kind of inquiry that is involved is the kind that is error-prone and the kind that would be benefitted by procedural fairness." Tr. at 42:5-42:11. But the Court is not persuaded that the abstract approach is the correct one here. With the benefit of a full factual record—in this case, following years of discovery—plaintiffs in pattern and practice claims cannot rely on abstract legal concepts alone. Although abstract legal concepts may inform the Court's analysis regarding the risk of error, GE must also demonstrate that the current procedures in fact result in an unacceptable rate of error. It would make little sense to ignore the empirical record altogether in favor of a hypothetical concern that the risk of error may be too high.

a. Abstract Concepts

According to GE, the crucial element missing from EPA's pre-UAO issuance process is a neutral decision-maker. Although the Constitution does not *require* a neutral decision-maker, *see, e.g.*, *Old Dominion*, 631 F.2d at 968 (holding that an opportunity to be heard by a contracting officer, the very person deciding whether the plaintiff is a "responsible" contractor, satisfies due process), ample case law supports GE's point that a neutral decision-maker is an important constitutional safeguard, *see, e.g.*, *Propert v. District of Columbia*, 948 F.2d 1327, 1333 (D.C. Cir. 1991). Therefore, the lack of a neutral decision-maker, as an abstract principle, supports

GE's argument that EPA's pre-issuance process is error-prone.

Several other abstract principles suggest the pre-decisional process may result in error. The risk of error is greater when "the State stands to benefit" by taking action that deprives someone of property. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56 (1993) (quoting *Harmelin v. Michigan,* 501 U.S. 957, 979 n.9 (1991)). Although there is no direct financial incentive at work here, EPA arguably stands to benefit by issuing UAOs because EPA has an interest in conserving Superfund resources. *See* EPA SOF at ¶ 2. The risk of error is also greater when junior or regional agency staff, without senior or centralized oversight, make deprivation-causing decisions. *See James Madison Ltd. by Hecht*, 82 F.3d at 1100. UAOs are issued by regional EPA officials without review and approval from EPA headquarters. EPA SOF at ¶ 42. Therefore, although nothing prevents PRPs from contacting EPA headquarters to register complaints about UAO issuance, the authority of regional EPA officials to issue UAOs also supports GE's argument that EPA procedures could result in a high rate of error.

On the other hand, some principles that GE cites do not suggest that EPA's process is error-prone. GE argues that *ex parte* procedures, like those in *Doehr*, 501 U.S. at 14, enhance the risk of error. In *Doehr*, the Supreme Court took issue with "secret, one-sided determination[s]" that provided affected parties with no notice or opportunity to be heard. *Id.* (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)). The informal pre-issuance process that EPA provides here, however, is neither secret nor one-sided. PRPs

are given multiple kinds of notice and have several opportunities to be heard before a UAO is issued. *See* EPA SOF at ¶¶ 5-23. GE also argues that the highly factual, highly technical nature of UAO issuance decisions elevates the risk of error. Certainly, the simpler the question, the lower the risk of erroneous decision. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609 (1974). And the more "highly factual" a question, the greater the risk of erroneous decision. *Doehr*, 501 U.S. at 8. But at the same time, courts often defer to agencies' highly technical decisions, reviewing such decisions only on an "arbitrary and capricious" standard. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Because the decision to issue a UAO is both factual and technical, this abstract principle neither helps nor hurts GE's case.

Still other abstract principles suggest that EPA's process is not error-prone. Most notably, representation by counsel during the pre-decisional process sharply reduces the risk of error. *See Reeve Aleutian*, 982 F.2d at 600. PRPs may be and usually are represented by counsel in pre-UAO issuance negotiations with EPA. EPA SOF at ¶¶ 21-22. This is, in the Court's view, of great significance. Therefore, although several aspects of the pre-UAO issuance process suggest, in the abstract, a high risk of error, others suggest neither a high nor a low risk of error, and still others suggest a low risk of error.

b. Concrete Evidence

Overlaid on this abstract assessment of the risk of error is the voluminous empirical record in this case. GE points to four categories of evidence drawn from that record to argue that EPA's process in fact results in errors in issuing UAOs. First, GE proffers cases demonstrating that EPA makes mistakes in other,

non-UAO contexts. Next, GE provides an expert report from Dr. Kip Viscusi, who examines whether EPA's remedy selection is erroneous under a cost-benefit, cancer-prevention standard. Third, GE relies on declarations cataloging the experiences of several PRPs, including some sites where GE itself was issued a UAO. Finally, GE provides evidence from reimbursement proceedings filed by complying PRPs against the government.

The cases demonstrating that EPA has made mistakes in other CERCLA contexts are not informative as to EPA's rate of error in issuing UAOs. GE cites to seven cases.[18] But none involve UAOs. Rather, they merely demonstrate that EPA has made some mistakes in administering other sections of CERCLA. That EPA makes some mistakes is unsurprising; every agency, especially one as large as EPA, makes mistakes. The APA's "arbitrary and capricious" standard for the review of agency action anticipates that some agency errors will not warrant judicial reversal. All that courts can expect is that agency procedures "achieve an acceptable rate of error." *See Califano v. Boles*, 443 U.S. 282, 285 (1979). Even if these seven cases were relevant to determining EPA's rate of error in issuing UAOs—which they are not—the Court has no context

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[18] *United States v. Burlington N. R.R. Co.*, 200 F.3d 679 (10th Cir. 1999); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889 (5th Cir. 1993); *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990); *United States v. B & D Elec., Inc.*, No. Civ.A.05-0063, 2007 WL 1395468 (E.D. Mo. May 9, 2007); *United States v. Broderick Inv. Co.*, 963 F. Supp. 951 (D. Colo. 1997); *United States v. Wedzeb Enters., Inc.*, 844 F. Supp. 1328 (S.D. Ind. 1994); and *United States v. Hardage*, 663 F. Supp. 1280 (W.D. Okla. 1987).

whatsoever to determine what kind of "rate of error" these seven cases reflect.

The expert report from Dr. Viscusi is similarly unhelpful.[19] Dr. Viscusi examined EPA's clean-up efforts under CERCLA from 1993 to 1999 to analyze whether EPA effectively prevents cancer from a cost-benefit perspective. Viscusi Report at ¶¶ 7, 10-13. But Dr. Viscusi's report is at once too broad and too narrow. His report is too broad because it examines EPA's overall administration of CERCLA. Even if Dr. Viscusi's study reveals that EPA makes errors in its overall administration of CERCLA, that does not show that EPA errs in issuing UAOs because Dr. Viscusi did not conduct a UAO-specific analysis. The report is too narrow because it focuses only on cancer prevention and cost-benefit analysis—just two of the nine factors EPA must consider in selecting a remedy. *See* 40 C.F.R. § 300.430(e)(9)(iii); *see also Ohio v. EPA*, 997 F.2d 1520, 1531 (D.C. Cir. 1993) (noting that cost is given less weight in remedy selection than some of the other nine factors). Whatever weight Dr. Viscusi's report may have colloquially or politically, it is of little value in assessing whether EPA's current administrative process erroneously deprives PRPs of protected property interests by issuing UAOs.

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[19] Indeed, GE's counsel indicated at the motions hearing that Dr. Viscusi's report is primarily intended to show that political factors influence EPA's decision-making process, not that EPA in fact makes errors in issuing UAOs. *See* Tr. at 46; *see also* GE SUF at ¶¶ 68-69.

GE's best evidence is in its declarations. In five declarations,[20] GE describes nine sites[21] where EPA supposedly erred in issuing a UAO. Five of these sites do not advance GE's case. For the Li Tungsten site, the Grand Street Mercury site, the Fletcher's Paint Works site, the Herington Army Airfield site, and the Woolfolk Chemical Works site, the declarants provide only their unsubstantiated assertions that a UAO either was issued to the wrong PRP or contained some improper remedy. For the Fletcher's Paint Works site, for example, Randall McAlister, a GE Senior Program Manager, states that GE was unfairly targeted and that EPA selected an improper remedy. *See* McAlister Decl. ¶¶ 69-98. Without some independent verification that EPA in fact made errors in issuing a UAO to GE at the Fletcher's Paint Works site, McAlister's declaration is self-serving and uncorroborated. Such declarations are of little value at the summary judgment stage, *See Tolson v. James*, 315 F. Supp. 2d 110, 116 (D.D.C. 2004), and certainly do not represent concrete evidence establishing an unacceptable risk of error in the section 106 UAO process.

The remaining four sites do offer some support for GE's case. GE has demonstrated that EPA's initial remedy selection at two sites was erroneous. At the

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[20] Declaration of Richard Krablin; Declaration of John Baker; Declaration of Daniel Uyesato; Declaration of Randall McAlister; and Supplemental Declaration of Randall McAlister.

[21] The Grand Street Mercury Superfund site; the Fletcher's Paint Works site; the former GE electrical transformer manufacturing facility in Rome, Ga. ("Rome site"); the Vega Alta Superfund site; the Solvent Savers Superfund site; the Li Tungsten site; the Woolfolk Chemical Works site; the Herington Army Airfield site; and the Palmerton Zinc Pile Superfund site.

Vega Alta site, GE took issue with an EPA-proposed remedy to clean up the site. Supp. McAlister Decl. ¶¶ 18-19. GE proposed its own remedy, and EPA eventually withdrew its previous remedy and adopted GE's approach. *Id.* ¶¶ 22-23. Similarly, at the Solvent Savers site, EPA replaced its initial remedy with a PRP-selected one after the PRPs demonstrated that EPA's initial remedy was inefficient. *Id.* ¶¶ 30-36. At two other sites, GE has shown that EPA erroneously issued a UAO. At the Rome site, GE was issued a UAO even though GE had negotiated a clean-up plan with state environmental officials under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* McAlister Decl. ¶ 134. GE was able to seek review through RCRA, and EPA withdrew the UAO before the court could act. *Id.* ¶¶ 146, 148. At the Palmerton Zinc Pile site, Horsehead Industries, another PRP, was issued a UAO to clean up a site that Horsehead had never owned or operated. Krablin Decl. ¶¶ 18-21. Horsehead was able to obtain review because of a parallel cost recovery action. *Id.* ¶ 29. The court eventually issued a consent order preliminarily enjoining enforcement of the UAO against Horsehead. *Id.* ¶ 31.

GE's evidence from reimbursement proceedings is revealing but does not advance GE's position. Under section 106(b)(2), PRPs may seek reimbursement upon completion of the cleanup if they believe that they have been issued a UAO in error. If EPA refuses to reimburse the PRP, then the PRP may file suit in a federal district court, where the PRP can challenge both liability and remedy selection. *See* 42 U.S.C. §§ 9606(b)(2)(C)-(D). Given that thousands of PRPs have complied with UAOs, reimbursement proceedings would appear to be the most fertile ground for finding EPA error. But GE concedes that "there has

only been one Section 106(b) case that has resulted in a final judgment adverse to EPA requiring reimbursement from the government." GE SUF at ¶ 154. At the summary judgment stage, the paucity of evidence of error from reimbursement proceedings is telling. *See Celotex*, 477 U.S. at 322.

In sum, when all four categories of evidence proffered by GE are carefully scrutinized, GE has pointed to just five instances of error-four examples from specific sites described in GE's declarations and one example of a complying PRP successfully obtaining reimbursement from the government. EPA has issued 1,705 UAOs to more than 5,400 PRPs since 1982. *See* Rouhani Report at ¶¶ 4.3, 6.5.2. If GE were attempting to present an exhaustive list of EPA's errors in issuing UAOs, this would represent a minuscule error rate. But even if GE is not presenting an exhaustive list of EPA's errors for all PRPs, the Court can presume that GE has at least thoroughly surveyed all 68 of the UAOs that GE itself has been issued. In the evidence presented, GE has demonstrated that EPA has made only three errors[22] in issuing those 68 UAOs—an error rate of 4.4 percent. Although not insignificant, 4.4 percent is an "acceptable rate of error" for EPA in issuing UAOs under section 106 of CERCLA. *See Shands*, 602 F.2d at 1160 (holding that a four percent error rate constitutes "substantial compliance" with a statute); *see also Humphries v. County of Los Angeles*, Civ.A.No. 05-56467, 2008 WL 4791868 at *20 (9th Cir. Nov. 5, 2008) (holding that a 50 percent error rate would constitute a substantial risk of erroneous deprivation); *Dupuy v. Samuels*, 397 F.3d 493, 505, 512 (7th

[22] Those are alleged errors at the Vega Alta site, the Solvent Savers site, and the Rome site.

Cir. 2005) (holding that a 74.6 percent error rate is unacceptably high). And given the size of the record after several years of exhaustive discovery, the paucity of evidence demonstrating a higher rate of error for all PRPs casts doubt on assuming an error rate even as high as four percent.

4. Balancing

Having identified the private interests, government interests and risk of error, the final step in this due process assessment is to balance these factors against one another. *See Mathews*, 424 U.S. at 334. The balancing process is dynamic—for example, while greater process could reduce the risk of error, it also adds cost and delay, thereby burdening both government and private interests. Here, GE has stated a preference for a full judicial hearing. *See* Tr. at 9:8-10:1. But courts seldom import the full judicial model into the administrative decision-making process. In lieu of a full judicial hearing, GE has stated that the key ingredient for the additional process it thinks necessary is a neutral decision-maker. *See id.* As discussed above, courts have endorsed both ALJs, *see Rosen*, 735 F.2d at 570, and detached "presiding officers" within an agency, *see Chemical Waste*, 873 F.2d at 1485, as adequate neutral decision-makers. Therefore, the Court will undertake the *Mathews* balancing to determine whether an agency presiding officer or an ALJ is constitutionally necessary.[23]

The precise nature of the interests at stake is worth repeating. The private interest depends on

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[23] If neither a presiding agency officer nor an ALJ as a neutral decision-maker is constitutionally required for the section 106 UAO pre-issuance process, then the substantially more burdensome full judicial hearing would not be necessary either.

whether or not a PRP complies. If the PRP complies, then the average costs of compliance are $4 million and the deprivation lasts for an average of three years. If the PRP does not comply, then the average size and length of the deprivation are substantial but unclear. And whether or not a PRP complies, the deprivations are primarily financial, although for some PRPs the financial deprivations are sufficiently large to have collateral effects on operations. As for the government interest, EPA does not issue UAOs in emergency situations. But EPA nonetheless has a substantial financial and administrative interest. Because UAOs are issued frequently, even minimal additional process would tax EPA's resources. Finally, the risk of error—as represented through the actual rate of error over many years in this pattern and practice case—is low. GE has provided concrete evidence to establish that EPA has made errors in issuing five UAOs, including three UAOs issued to GE itself. Assuming that GE has plumbed for error all 68 of the UAOs that it has received, and assuming that GE's experience is representative, EPA makes some sort of error in roughly four percent of its UAOs.

The Court will first consider whether a pre-issuance hearing before a presiding officer within EPA would so reduce the risk of error, without unduly burdening the government interest, as to be constitutionally required. At first glance, the burden on the government interest appears minimal. For any given UAO, a hearing before a presiding officer would add only weeks or a few months to an issuance process that usually takes years. *See* Rouhani Report at ¶ 6.1.3. Moreover, the costs of a single hearing before a presiding officer are minimal, especially considering the size of the private interests at stake.

But the Court may not examine the burden on the government at such a granular level. *See Gray Panthers v. Califano*, 466 F. Supp. 1317, 1324 (D.D.C. 1979), *rev'd on other grounds sub nom. Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980). Rather, the Court must consider the cumulative effect of the additional process. *Id.* As previously discussed, EPA issued 1,705 UAOs to more than 5,400 PRPs in the 285 months from August 16, 1982 to May 25, 2006. *See* Rouhani Report at ¶¶ 4.3, 6.5.2. That is a rate of six UAOs issued to nineteen PRPs every month. Because UAOs are normally only issued at the conclusion of an extended negotiation period, many (if not all) PRPs would likely invoke the opportunity for a hearing before a presiding officer. In the aggregate, then, the requirement of a presiding officer would certainly constitute a substantial financial and administrative cost to the government.

On the other hand, a pre-decision hearing by an agency presiding officer would not significantly reduce the risk of error. As demonstrated in this pattern and practice case by the low rate of error, the risk of error is already very small. The cost of additional process must indeed be minimal to justify adding to a process that already results in an acceptably low risk of error. *See Tillman v. Lebanon Cty. Correctional Facility*, 221 F.3d 410, 422 (3d Cir. 2000). However, as discussed above, the cost of a presiding officer is not as minimal as it might initially appear.

Finally, the size and nature of the private interests of the PRP are not so great as to justify increased government costs with only a marginal improvement in the rate of error. Although the privates interest are significant, GE has not demonstrated that the

primarily financial interests at stake here routinely have such collateral effects as to constitute a "brutal need" requiring greater pre-deprivation process. *See Arnett v. Kennedy*, 416 U.S. 134, 169 (1974). Moreover, any benefit to those private financial interests would be offset somewhat by the additional costs of the enhanced pre-issuance process—full adversarial hearings with legal representation, even if just before an agency official, are expensive. Hence, because the benefit of additional process is low and the cost of that process is fairly high, the Court finds that a hearing before a presiding officer is not constitutionally necessary.

This result does not change when the pre-issuance hearing is before an ALJ rather than a presiding officer. The Court's weighing of the private interests remains unchanged. The type of hearing does not impact the size and nature of the deprivation. Nor would the impact of a hearing before an ALJ change the Court's rate of error analysis. It is hard to reduce the rate of error when it is very low to begin with. Only the analysis of the government interest changes when considering a hearing before an ALJ instead of a presiding officer. But a pre-issuance hearing before an ALJ would *increase* the burden on the government interest. Hearings before an ALJ are more formal and have more of the trappings of the judicial process than informal hearings before a presiding officer. Hearings before an ALJ would undoubtedly be lengthier and more time-consuming. Because these hearings frequently would be invoked by PRPs, requiring an ALJ would constitute an even greater financial and administrative cost to the government than a hearing before a presiding officer. Based on the balancing of these factors, then, the Court

concludes that the Constitution does not require a pre-issuance hearing before an ALJ either.

In summary, although GE has presented evidence of isolated errors by EPA, such infrequent errors—constituting a reasonably low overall risk of error—do not warrant the sweeping changes GE requests. Errors should be addressed by a PRP when they occur either by not complying with a UAO and defending a subsequent enforcement proceeding or by complying with a UAO and seeking post-completion reimbursement. Those avenues remain available to PRPs under CERCLA as a more effective means to address the occasional errors revealed by the record before this Court. To the extent that GE continues to believe that EPA generally overuses or abuses UAOs, thereby overstepping its mandate, any broader remedy should be sought from Congress, not the courts.

CONCLUSION

In their motions for summary judgment, GE and EPA focus on two due process arguments: unconstitutional coercion under *Ex parte Young* and unconstitutional deprivation of property or liberty under *Mathews v. Eldridge*. For the reasons explained above, and based on the extensive record developed through years of discovery, the Court agrees with EPA on both points and concludes that GE has not shown that EPA's pattern and practice of administering section 106 of CERCLA violates due process. Therefore, GE's motion for summary judgment is denied and EPA's motion for summary judgment is granted. A separate order has been issued on this date.

APPENDIX D

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

No. CIV.A. 00-2855(JDB).

GENERAL ELECTRIC COMPANY,
Plaintiff,

v.

STEPHEN L. JOHNSON, ACTING ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant.

March 30, 2005.

MEMORANDUM OPINION

BATES, District Judge.

Plaintiff General Electric Company ("GE" or "plaintiff") has brought a broad constitutional challenge to section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), 42 U.S.C. § 9601 *et seq.* GE seeks a declaratory judgment that section 106, 42 U.S.C. § 9606, in tandem with sections 107(c)(3) and 113(h), 42 U.S.C. §§ 9607(c)(3), 9613(h), creates a regime that violates the Due Process Clause of the Fifth Amendment. Am. Compl. at ¶ 1. Presently before the Court is the motion for summary judgment of

defendants the United States Environmental Protection Agency and its acting administrator, Stephen L. Johnson (collectively "EPA" or "defendant").[1]

EPA's motion for summary judgment contends that GE's constitutional challenge to CERCLA is a facial challenge limited to review of the text of CERCLA. According to EPA, such a facial challenge to a statute is analyzed under the *Salerno* doctrine, which dictates that a plaintiff must establish that a statute is unconstitutional in every application. *See United States v. Salerno*, 481 U.S. 739 (1987). EPA argues that, at the very least, CERCLA is constitutional in emergency situations, and therefore GE's facial constitutional challenge must fail.

GE counters that it has alleged not only a due process violation based on the text of CERCLA, but also that EPA's pattern and practice of administering section 106 of CERCLA creates a procedural due process violation. According to GE, its pattern and practice claim survives the jurisdictional bar of section 113(h) as interpreted in the D.C. Circuit's prior decision in this case. *See General Elec. Co. v. Environmental Protection Agency*, 360 F.3d 188 (D.C. Cir. 2004). GE also urges the Court to permit discovery on both its claims prior to considering EPA's motion for summary judgment.

For the reasons discussed below, the Court will grant EPA's motion for summary judgment on GE's facial challenge to the text of CERCLA. The Court also concludes, however, that GE has alleged a "pattern and practice" constitutional claim, which is neither precluded by section 113(h) and the earlier

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[1] The Acting Administrator of EPA has been substituted pursuant to Fed.R.Civ.P. 25(d)(1).

decision of the D.C. Circuit nor the subject of EPA's motion. Therefore, GE may proceed with discovery on that claim.

BACKGROUND

I. The CERCLA Framework[2]

CERCLA is "a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). CERCLA requires that sites contaminated by toxic wastes be abated and cleaned up expeditiously by, or at the expense of, "those responsible for the hazardous condition." *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 (8th Cir. 1995).

CERCLA contemplates two distinct kinds of clean-up actions arising under its statutory framework: removal actions and remedial actions. *See* 42 U.S.C. §§ 9601(23)-(24). Removal actions, which occur before remedial action is undertaken, are short-term actions taken to halt any immediate risks posed by hazardous wastes. *Id.* § 9601(23). Remedial actions are more permanent remedies taken to clean up contamination, and are "taken instead of or in addition to removal actions." *Id.* § 9601(24).

Section 122 of CERCLA authorizes EPA to initiate negotiations with potential responsible parties ("PRPs") to "allow [for] expedient and efficient settlements of potential liability." *Dravo Corp. v. Zuber*, 13 F.3d

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[2] A more comprehensive discussion of the CERCLA framework is provided in the March 31, 2003 decision of this Court. *See General Elec. Co. v. Whitman*, 257 F.Supp.2d 8, 12-14 (D.D.C. 2003).

1222, 1227 (8th Cir. 1994); 42 U.S.C. § 9622. If negotiations fail, one option under CERCLA for cleaning a hazardous waste site is for EPA to perform the remediation itself, using money taken out of the Superfund established by Congress. EPA would then bring an action in federal district court under section 107 of CERCLA to recover its costs from parties responsible for the contamination. *See* 42 U.S.C. §§ 9607(a)(4)(A), 9611(a).

On the other hand, section 106 allows EPA to order parties to clean a site contaminated with hazardous waste, and to file a civil action in federal district court to compel a party to comply with EPA's proposed remedy. 42 U.S.C. § 9606(a). Section 106 administrative orders lie at the heart of GE's due process challenge in this case. *See* Am. Compl. ¶ 2. Before issuing a section 106 order, EPA must determine "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a).

Under the penalty provision of section 106(b), any person who, "without sufficient cause," willfully violates a section 106 order, or fails or refuses to comply with such an order, may be fined up to $25,000 for each day the violation or non-compliance continues. *Id.* § 9606(b). In addition, under section 107, a party who fails to comply with a section 106 order also faces the possibility of punitive damages up to three times "the amount of any costs incurred by the [Superfund] as a result of such failure to take proper action." *Id.* § 9607(c)(3).

These fines and penalties are not automatic under CERCLA-EPA must bring a civil action in district

court to compel compliance with its order. Even then, the district court has discretion as to whether noncompliance warrants a fine, penalties, or punitive damages, and if so, how much. *Id.* Under the statute, if the district court determines that a party had "sufficient cause" for not complying with the order, no penalties or fines can be imposed. *See id.* §§ 9606(b), 9607(c)(3). Even if a party is unable to establish a "sufficient cause" defense, the statute does not mandate issuance of the prescribed fines and penalties, but rather the district court has discretion to determine the amount of civil fines or penalties up to the statutory maximum of $25,000 per day. *See id.*

The scope, nature and limits of judicial review of EPA actions under CERCLA are set out in section 113. *See id.* § 9613. The thrust of section 113(h) is that one cannot obtain pre-enforcement review of EPA orders (including section 106 orders) or EPA response actions with respect to a contaminated site.

II. Procedural History

GE filed its Complaint on November 28, 2000, which it then amended on March 14, 2001. GE's Amended Complaint contains a two-pronged "facial" challenge to CERCLA. First, according to GE, the text of CERCLA itself gives rises to a procedural due process violation because PRPs are never afforded a meaningful hearing to challenge the issuance of an administrative order, and thus suffer a deprivation of property without a hearing; moreover, the CERCLA penalty scheme is so coercive it amounts to a due process violation under *Ex Parte Young*, 209 U.S. 123 (1908). *See* Am. Com pl. ¶¶ 21-28, 50, 54. Second, GE contends that EPA's "pattern and practice" of administering CERCLA violates GE's due process rights. *Id.* ¶¶ 17-20, 51-52, 54. Under this second theory, GE

alleges that EPA: uses section 106 orders in non-emergency situations; administers the statute to affect a deprivation of property without a hearing; administers section 106 so that PRPs are not provided prompt hearings after suffering a property deprivation; and administers the fines and penalties provisions coercively to create a due process violation under *Ex Parte Young*.

In March 2001, EPA moved to dismiss GE's Amended Complaint for lack of subject matter jurisdiction. EPA argued that this Court lacked subject matter jurisdiction to consider GE's constitutional challenges to CERCLA because section 113(h) operates to delay judicial review of any section 106 order until after the clean up is complete. This Court granted EPA's motion to dismiss, concluding that section 113(h) precluded judicial review of GE's claims as framed. *See General Elec. Co.*, 257 F.Supp.2d at 12. On March 2, 2004 the D.C. Circuit reversed that decision, and instructed this Court on remand to consider the merits of what it called GE's facial due process challenge to CERCLA. *See General Elec. Co.*, 360 F.3d at 194.

LEGAL STANDARD

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may successfully support its motion by "informing the district court of the basis for its motion, and identifying those portions of 'the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (quoting Fed.R.Civ.P. 56(c)).

In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex*, 477 U.S. at 322. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted). Summary judgment is appropriate if the non-movant fails to offer "evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252.

ANALYSIS

According to EPA, GE makes only one constitutional challenge to CERCLA—a facial challenge based on the text of the statute. *See* Def. Mot. at 16. With respect to that claim, EPA moves for summary judgment on two grounds: that under the *Salerno* doctrine GE's facial constitutional claim must fail because, at the very least, CERCLA is constitutional in emergency situations, and, alternatively, that GE cannot show that the challenged provisions of CERCLA violate due process. EPA also contends that GE's "pattern and practice" claim is barred by section

113(h) as previously interpreted by the D.C. Circuit in this case. GE counters that it has stated and can pursue both of its due process challenges to CERCLA—textual and pattern and practice. GE thus argues that neither challenge is precluded and discovery should proceed.

I. Does GE Present a Pattern and Practice Challenge?

The threshold issue concerns the exact nature of GE's constitutional claim. EPA characterizes GE's claim as a facial challenge addressed to the text of CERCLA. *See* Def. Mot. at 3. EPA contends that is how the D.C. Circuit understood GE's claim when it said "we remand the case to the district court to address the merits of GE's facial due process claim." *General Elec. Co.*, 360 F.3d at 194. GE responds that its constitutional challenge to CERCLA is two-pronged. First, GE asserts that the text of CERCLA creates a procedural due process violation because PRPs suffer a deprivation of property but never receive a meaningful hearing under section 106, and the fines and penalties scheme of sections 106 and 107 is coercive under *Ex Parte Young*. Second, GE alleges that EPA has a pattern and practice of administering section 106 (in conjunction with sections 107 and 113) in a manner that denies PRPs the necessary protections of procedural due process.

When assessing the claims made by a party in litigation, this Court is guided by the "generous rules governing federal pleading." *Grogan v. General Maintenance Serv. Co.*, 763 F.2d 444, 449 (D.C. Cir. 1985). Under notice pleading rules, it is not necessary for a party to articulate in its complaint, with specificity, "the legal theories upon which he or she bases the claim." *See id.* (citing *Hanson v. Hoffmann*, 628 F.2d

42, 53 (D.C. Cir. 1980)). Applying those principles to GE's one-count Amended Complaint, the Court concludes that GE sets forth sufficient notice as to both of its theories challenging the constitutionality of CERCLA. First, the parties do not dispute that GE alleges a due process violation based on the text of CERCLA. *See* Am. Compl. ¶ 54 ("CERCLA fails to provide a prompt and meaningful opportunity for administrative or judicial hearing on an order after it has been issued."). Second, there is language within GE's Amended Complaint to support its position that it has also alleged a due process violation based on the pattern and practice of EPA's administration of CERCLA. In particular, the Amended Complaint makes several references to EPA administration of section 106. *See, e.g.*, Am. Compl. ¶ 2 ("EPA can and does issue unilateral orders compelling massive and onerous remediations of merely potential environmental hazards."); ¶ 51 ("EPA has exercised and will continue to exercise vast discretion in issuing coercive and burdensome orders, often in a highly arbitrary manner, without any meaningful statutory standards or procedural or judicial safeguards to limit its power.").

Such language in GE's Amended Complaint provides sufficient confirmation for the Court that GE has pled a due process violation on both its legal theories—the text of CERCLA as well as EPA's pattern and practice of administering the statute. Although, over the course of this litigation, the specifics of GE's constitutional challenge to section 106 have, to put it mildly, evolved, this Court will treat GE's Amended Complaint as raising both a textual challenge and a pattern and practice challenge to CERCLA.

A. The D.C. Circuit's Decision in *General Elec. Co.*

Acknowledging that GE has pled a pattern and practice claim is one thing. Whether GE may pursue the merits of its pattern and practice claim in light of the D.C. Circuit's prior opinion in this case is a separate inquiry altogether. EPA would have the Court find that to the extent GE has alleged a pattern and practice claim, such a claim is barred by that decision and section 113(h). The opinion of the D.C. Circuit provides considerable support for EPA's position regarding the viability of GE's pattern and practice claim. EPA emphasizes the holding of the decision: "[w]e hold that the plain text of § 113(h) does not bar GE's facial constitutional challenge to CERCLA." *General Elec. Co.*, 360 F.3d at 189. EPA also points to other instances in which the court characterized GE's existing claim as "facial." *Id.* at 190, 191. A facial challenge, argues EPA, is limited to the text of the statute. *See Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 69 (1994). Moreover, the court of appeals observed that "GE's due process challenge to CERCLA's administrative orders regime is not a challenge to the way in which EPA is administering the statute . . . but rather it is a challenge to the CERCLA statute itself." *General Elec. Co.*, 360 F.3d at 191. Finally, the court noted that GE "does not challenge any particular action or order by EPA." *Id.*

It would be inconsistent with all this language, and the holding of the D.C. Circuit, says EPA, if the decision were read to permit GE to pursue a pattern and practice claim. According to EPA, there are only two methods for challenging the constitutionality of a statute—facial or as-applied, *see* Def. Reply at 1—and the D.C. Circuit was clear that GE may pursue its

"facial" claim. Therefore, argues EPA, only GE's challenge to the text of the statute is permitted.

Although the D.C. Circuit's decision frequently refers to GE's challenge as "facial," excessive reliance upon semantics or labels may confuse the thrust of the decision. The court draws an important descriptive and substantive connection between facial and systemic claims, which supports GE's position that its pattern and practice claim is, like a facial claim, viable. The court uses language that draws an analogy between a "facial" and a "systemic" claim. *See General Elec. Co.*, 360 F.3d at 192 ("our holding that GE's constitutional challenge is not barred by § 113(h) would comport with precedent distinguishing between facial, or 'systemic,' and as-applied, or particularized challenges"). The court later distinguishes between "systemic and particularized challenges" concluding that section 113(h) of CERCLA does not bar GE's claim. *See id.* at 192-93.

More importantly, the court builds on that analogy between facial and systemic claims through relevant case law and the text and purpose of section 113(h) to confine the jurisdictional bar to only those claims challenging a specific order. *See id.* at 192-194. Like a facial challenge, a pattern and practice claim does not address only specific orders—it is a broader systemic challenge. The D.C. Circuit has thus placed claims such as GE's pattern and practice claim within the sphere of claims that can be brought notwithstanding section 113(h).

As the D.C. Circuit notes, other cases have permitted "facial or systemic" claims to proceed, notwithstanding jurisdictional bars to judicial review similar to section 113(h). *See Johnson v. Robison*, 415 U.S. 361, 373-74 (1974); *Lepre v. Dep't of Labor*, 275

F.3d 59, 67-68 (D.C. Cir. 2001) ("the Secretary's generic use of the mailbox rule—is both 'structural' and 'systemic,' and therefore review is not barred by § 8128(b)'s bar on review of specific 'action' of the Secretary"). The most revealing decision relied upon by the D.C. Circuit along this line is *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). In *McNary,* the plaintiff class brought a challenge to the manner in which the Immigration and Naturalization Service ("INS") was administering the Special Agricultural Worker ("SAW") provision. Although judicial review of a specific application was barred, the Supreme Court held that the plaintiff class was not precluded from challenging "unconstitutional practices and policies used by the agency in processing applications." *See McNary*, 498 U.S. at 492. The D.C. Circuit in *General Elec. Co.* directly applied the reasoning of the Supreme Court in *McNary* to find that a bar to judicial review, such as that in section 113(h) of CERCLA, does not preclude the type of systemic claim raised in *McNary,* and hence the facial and systemic claims here. *See* 360 F.3d at 192.

The D.C. Circuit found that the language of section 113(h) limits the jurisdictional bar only to challenges of specific section 106 orders. *Id.* at 192-193. The court observed that if Congress had wanted to delay judicial review of broader constitutional challenges to CERCLA, i.e., systemic claims, Congress certainly could have used such language. *Id.* at 192 ("As is no less true for CERCLA, the Court in *McNary* stated, 'had Congress intended the limited review provisions of [the jurisdictional bar] to encompass [systemic, collateral] challenges to [agency] procedures and practices, it could easily have used broader statutory language . . .'") (quoting *McNary*, 498 U.S. at 494). The court's discussion of the limited scope of the text

of section 113(h) thus provides further support of an intent to permit GE's pattern and practice claim.

Finally, the D.C. Circuit observed that limiting section 113(h) to challenges to specific section 106 orders comports with the purposes of section 113(h). *See General Elec. Co.*, 360 F.3d at 194. Section 113(h) is intended to prevent litigation from hindering or delaying a clean up effort. *Id.* However, a claim such as GE's pattern and practice challenge does not impair those important policy considerations underlying section 113(h), because a favorable decision for GE would only require additional procedures to be provided to GE prior to the issuance of a section 106 order. *See id.* Although the pattern and practice claim may require discovery, it does not require any site-specific facts, nor "does it depend on the type of information available only after site clean-up is completed." *Id.* Most importantly, because GE's pattern and practice claim is not based on any specific order, litigation of this systemic claim does not delay any specific clean up.

EPA would have the Court disregard this discussion by the D.C. Circuit. EPA argues that the court's use of the term "systemic" and its discussion of *McNary* are simply illustrative of the scope of possible claims in a statutory setting subject to a jurisdictional bar like section 113(h). According to EPA, the two principal reasons GE's pattern and practice claim does not survive the D.C. Circuit decision are the language the court used to describe GE's claim—facial—and the fact that GE's pattern and practice challenge does not exist as an independent constitutional theory. These arguments do not convince this Court that GE's pattern and practice

claim is precluded by section 113(h) as construed and applied by the D.C. Circuit.

If, as EPA argues, the D.C. Circuit in citing *McNary* was merely setting forth an example of the type of claim that could be brought in a similar statutory setting, then it is implicit that section 113(h) would not bar GE's pattern and practice claim. Even if the court was not directly addressing GE's pattern and practice claim through its discussion of *McNary*, that discussion cannot be disregarded. By setting out examples of the types of claims that can be brought notwithstanding a section 113(h)-type jurisdictional bar, the court necessarily was indicating that under section 113(h) a "systemic" constitutional challenge, like GE's pattern and practice claim, could be pursued. Therefore, although the D.C. Circuit did not directly address GE's pattern and practice claim, this Court concludes that the court of appeals would not bar GE's pattern and practice claim in light of its analysis and application of *McNary*.

If the D.C. Circuit meant to remand only a narrow textual challenge, some discussion delineating GE's claims might be expected. As discussed above, GE's Amended Complaint sets forth a basis for both of GE's legal theories. Moreover, GE argues that it put before the D.C. Circuit both of its claims regarding CERCLA. *See* Pl. Opp. at 9. Nonetheless, the D.C. Circuit speaks broadly about GE's claim, never indicating it was remanding only a challenge to the text of CERCLA but not the systemic pattern and practice claim. In fact, the court states that although a constitutional challenge to the administration of CERCLA may be subject to section 113(h), because GE's claim in this case does not challenge an order issued under section 106, "GE's amended complaint

sets forth a 'constitutional challenge to the CERCLA statute [that] is not covered by [§ 113(h)].'" *General Elec. Co.*, 360 F.3d at 191 (quoting *Reardon v. United States*, 947 F.2d 1509, 1515 (1st Cir. 1991)). This broad language casts significant doubt on EPA's interpretation that the court only remanded a textual claim.

EPA's assertion that GE's pattern and practice claim does not independently exist neglects the several citations in the appellate decision to other cases that have recognized such claims. *See* 360 F.3d at 192. In *Lepre v. Dep't of Labor*, for example, the court permitted a challenge to the "systemic procedures" utilized in the administration of the statute. *See* 275 F.3d at 67-68. In *McNary*, the plaintiff class was challenging the INS practice in administering the SAW provision. *See* 498 U.S. at 492. GE's legal theory of a pattern and practice claim has thus been recognized in other cases, and presents a cognizable legal theory.

B. Standing

EPA also argues that GE lacks standing to bring a pattern and practice claim. In *McNary* the broad challenge to INS's administration of SAW was brought by a class of plaintiffs. *See* 498 U.S. at 487. EPA asserts that GE's pattern and practice challenge necessarily raises third party claims, for which it does not have standing. Therefore, under EPA's reasoning, GE alone cannot bring a pattern and practice claim because it cannot meet the constitutional standing requirements to raise third party claims—injury in fact, causality, and redressability.

This argument fails to recognize the true nature of GE's claim. GE does not make a claim on behalf of

other PRPs, and no relief is sought on their behalf. Instead, GE alleges that EPA's pattern and practice in administering the section 106 order regime in CERCLA violates due process, and GE seeks broad declaratory and injunctive relief to address that violation, but no relief as to specific section 106 orders. GE's standing to bring this claim is based upon the fact that this allegedly unconstitutional practice has been applied to and injured GE. *See* Am. Compl. ¶¶ 29-47 (setting out instances in which section 106 orders have been issued to GE). EPA's alleged pattern and practice as it pertains to other PRPs is not an element of the claim for relief raised by GE, although it certainly would be evidence of the alleged unconstitutional pattern and practice. Because GE has asserted that section 106 orders have issued against it in the past pursuant to EPA's allegedly unconstitutional pattern and practice, GE satisfies the prerequisites for constitutional standing.[3]

II. Textual Challenge

EPA's motion for summary judgment argues that GE's constitutional challenge to the text of CERCLA should be decided exclusively based on the language in the statute, and therefore no discovery is necessary and the claim is ripe for adjudication. Accordingly, EPA contends that GE's textual challenge to CERCLA fails under the *Salerno* standard because GE cannot establish that the section 106 order regime of CERCLA is unconstitutional in every application. *See Nebraska v. EPA*, 331 F.3d 995, 998

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[3] EPA has acknowledged that its motion for summary judgment does not address GE's pattern and practice claim, and hence the Court cannot consider the merits of that claim at this time. GE seeks discovery to develop the facts necessary to establish a pattern and practice claim.

(D.C. Cir. 2003). Alternatively, EPA argues that GE cannot show any due process violation based on the text of CERCLA.

GE raises three textual constitutional problems with CERCLA: (1) a PRP is deprived of property without a pre-deprivation hearing; (2) a PRP never receives a meaningful post-deprivation hearing; and (3) the civil fines and penalties that accompany administrative orders are so coercive that they constitute a due process violation under *Ex Parte Young*, 209 U.S. 123 (1908). GE also asserts that it needs discovery to pursue its textual challenge to CERCLA, and therefore the Court should defer ruling on EPA's motion for summary judgment pending discovery.

GE has submitted an affidavit under Fed.R.Civ.P. 56(f) that identifies factual issues that GE believes must be resolved through discovery before the Court can consider EPA's motion for summary judgment. GE argues in that affidavit that EPA has created factual issues through assertions made in its motion for summary judgment. *See* GE's Rule 56(f) Affidavit ¶ 11. However, a facial challenge to the text of a statute does not typically require discovery for resolution because the challenge focuses on the language of the statute itself. *See Café Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274, 1282 (11th Cir. 2004); *New Hampshire Motor Transport Ass'n v. Rowe*, 324 F.Supp.2d 231, 232 (D.Me. 2004) ("discovery . . . [on state statute] not necessary to a ruling on a facial preemption challenge"). Furthermore, the factual issues raised by GE in its Rule 56(f) affidavit pertain to GE's pattern and practice claim, and are not relevant to resolution of GE's textual challenge. Because there are no questions of fact that require resolution for GE's textual challenge, this Court will proceed to

the merits of EPA's motion for summary judgment on that claim.

A. Deprivation of Property

GE's claim that it and other PRPs are deprived of property without the requisite pre-deprivation hearing is largely based on *Mathews v. Eldridge*, 424 U.S. 319 (1976), under which the competing interests are balanced to determine the process required prior to a deprivation of property or liberty. GE invites this Court to engage in the three-part balancing test of *Mathews*, which weighs the private interest, the risk of error and the governmental interest to determine whether the procedure provided is sufficient to satisfy the constitutional requirements of due process. *See* 424 U.S. at 335. However, before the Court undertakes a *Mathews* balancing assessment, GE must first establish that under CERCLA a PRP suffers a deprivation of property upon the issuance of an order under section 106.[4] *See American Mfrs. Mut. Ins. Co.*

[4] In *Employers Ins. of Wausau v. Browner*, 848 F.Supp. 1369, 1374-76 (N.D. Il. 1994), the district court engaged in a *Mathews* three-part balancing test in a procedural due process challenge to section 106 orders. However, the district court acknowledged that the EPA can only force compliance with a section 106 order by going to court, and therefore there was no deprivation. *Id.* at 1375 n.10. Additionally, in *Chemical Waste Mgmt. v. U.S. EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995), the D.C. Circuit applied the *Mathews* analysis to EPA's issuance of off-site rules. In doing so, the court assumed a constitutionally protected property or liberty interest before proceeding to the three-part test. *Id.* Although these courts either disregarded or assumed away the threshold deprivation question, this Court will not engage in the three-part balancing test under *Mathews* if there is no deprivation of GE's constitutionally protected liberty or property interests. *See Reardon*, 947 F.2d at 1517 ("If there is no significant property interest involved, the [due process] inquiry is at an end.").

v. Sullivan, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'"). EPA argues that CERCLA does not affect a deprivation of property without a hearing, because until a court actually enforces compliance a PRP is not deprived of any property.

GE, on the other hand, contends that the mere issuance of a unilateral administrative order ("UAO") under section 106 triggers a deprivation of property. Prior to the issuance of a UAO, GE's argument goes, the PRP is under no legal obligation to clean up the site, but once EPA issues the order, regardless of the PRP's response, the UAO imposes binding obligations upon the PRP. *See* Pl. Opp. at 24. Indeed, penalties and fines may begin accruing shortly after the date on which the UAO is issued, depending on the specific compliance requirements. *See* 42 U.S.C. § 9606(b)(1) (setting a fine of $25,000 per day that a PRP does not comply with a UAO). GE analogizes the imposition of fines under a UAO to a judgment for money damages—it may take a court order to enforce the judgment, but payment is due from the date of the judgment. *See* Pl. Opp. at 24-25.[5]

GE contends that the UAO need not be self-executing to constitute a deprivation, citing the Supreme Court's decision *Hodel v. Virginia Surface Mining*, 452 U.S. 264, 298-301 (1982). In *Hodel*, an administrative order issued by the Secretary of Interior requiring the immediate cessation of mining

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[5] The analogy is far from perfect, as a judgment has a much greater degree of finality than a penalty under a UAO, which is still subject to judicial assessment under "sufficient cause" and discretionary standards. *See* 42 U.S.C. § 9606(b).

operations was found to constitute a deprivation of property even though judicial intervention was required to collect penalties. *See also Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (holding replevin statute unconstitutional although it merely authorized the seizure of property, which occurred only after the order was given to the sheriff).

GE's arguments fall short of establishing that a PRP, under the language of the statute alone, suffers a cognizable deprivation of property upon the issuance of a section 106 order. Under 42 U.S.C. § 9606, EPA can issue a clean up order to a PRP, which then has two choices—comply or refuse to comply. If the PRP refuses, EPA can only force compliance by going to a district court. *See* 42 U.S.C. § 9606(b)(1). Therefore, while issuance of the section 106 order does require the PRP to make a decision regarding compliance, the mere issuance of the order does not create a cognizable deprivation of a significant property interest triggering the procedural due process analysis under *Mathews*. The ability of the PRP to choose, under the language of the statute, whether to comply with a section 106 order is key. Upon a refusal to comply with a section 106 order, EPA is powerless to deprive the PRP of property without judicial intervention. On the other hand, were the PRP to be deprived of any meaningful choice to refuse to comply with an order, that might pose a different situation in assessing whether a deprivation of property has occurred.[6]

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[6] This decision regarding the deprivation of property or liberty upon issuance of a section 106 order in no way contemplates whether EPA's pattern and practice in the administration of section 106, i.e., the control over timing of review and use of the penalty provisions, may eliminate the

GE's reliance on *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991), to support its argument that issuance of a section 106 order causes a deprivation of property is misplaced, because the enforcement mechanisms in section 106 are quite different than the CERCLA lien provisions ruled unconstitutional by the First Circuit in *Reardon*. The EPA can file a lien on real property without any prior hearing. *See Reardon*, 947 F.2d at 1519. The First Circuit, relying on *Connecticut v. Doehr*, 501 U.S. 1 (1991), noted that a lien significantly encumbers real property, and therefore amounts to a deprivation of property. *See* 947 F.2d at 1518 (finding that a lien on property "cloud[s] title, limit[s] alienability, [and] affect[s] current and potential mortgages"). The mere issuance of a section 106 order, on the other hand, does not have that same tangible impact on a PRP or its property. There is no immediate significant impact on a property interest, and no penalties need be paid at that time. Under the statutory language and structure, EPA does not through the mere issuance of a UAO under section 106 deprive a PRP of a significant property interest without judicial intervention. *Reardon*, with its limited focus on the unique consequences of a lien on real property, does not support a conclusion to the contrary.

GE's argument that a section 106 order need not be self-executing in order to effect a deprivation of property is unavailing. The Supreme Court never actually considered in *Hodel* whether the order of the Secretary of the Interior halting mining operations

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choice available to a PRP. This decision thus does not foreclose the possibility of GE establishing that EPA's pattern and practice in administering UAOs constitutes a deprivation of property.

amounted to a deprivation of property. Moreover, the order challenged in *Hodel* affirmatively required an *immediate* cessation of mining operations. *See* 452 U.S. at 300. There is no similar deprivation when EPA issues an order under section 106, since compliance will generally entail a drawn out undertaking, which may not even commence in concrete terms for months. In that setting, a PRP does not suffer a significant deprivation of property simply upon the issuance of a section 106 order.[7]

GE's citation to *Fuentes v. Shevin*, 407 U.S. 67 (1972), on the issue of self-executing orders is also inapposite. Although the replevin statute in *Fuentes* required a sheriff to execute the order issued to an individual, the injured party still did not receive any type of hearing or opportunity to challenge the action until after the property has been seized. *Id.* at 75. The fact that the order required intervention by a sheriff to be effectuated does not make *Fuentes* analogous to this case. The sheriff in *Fuentes*, upon executing the order, could not provide the injured party any opportunity to be heard. *Id.* In order for section 106 to have effect, the EPA must go to court to force compliance. *See* 42 U.S.C. § 9606(b)(1). At that time, before any deprivation occurs, the PRP has an opportunity to be heard. *See Fuentes*, 407 U.S. at 80 ("The constitutional right to be heard is a basic aspect of the duty of government to follow a fair

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[7] In *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 336 (1920), also cited by GE on this issue, the Court struck down the rate setting provision because of the penalties for non-compliance were violative of *Ex Parte Young*. The Supreme Court did not address the same deprivation of property issue currently before this Court.

process of decisionmaking when it acts to deprive a person of his possessions.").

GE, as part of its argument in favor of applying *Mathews*, also suggests that this Court should look to the reasoning of the court in *TVA v. EPA*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied*, 124 S.Ct. 2096 (2004). In that decision, the Eleventh Circuit held that the issuance of administrative compliance orders ("ACOs") by EPA under the Clean Air Act was unconstitutional. GE argues that UAOs issued under section 106 are analogous to ACOs, and accordingly this Court should follow the lead of the Eleventh Circuit. However, the reasoning of the court in *TVA* is inapposite to the question before this Court. There, the Eleventh Circuit struck down the imposition of penalties for noncompliance with an ACO because the standard for EPA's determination to issue an ACO was "any information available." *Id.* at 1256. The court found that meaningful judicial review of EPA's determination based on "any information available" could not be conducted. *Id.* at 1255-59. In the case of a section 106 order, however, there is no similarly indefinite standard; instead EPA is required to make a finding that there is an "imminent and substantial endangerment to the public health and welfare." 42 U.S.C. § 9606(a). Fines and penalties are also not automatic because the PRP can present a "sufficient cause" defense. *See* 42 U.S.C. § 9606(b)(1). Furthermore, a PRP can challenge the issuance of the section 106 order as arbitrary and capricious on the administrative record. *See* 42 U.S.C. § 9606(b)(2)(D). The Eleventh Circuit in *TVA*, moreover, did not directly address the question whether the issuance of an ACO constituted a deprivation of

property.[8] For all these reasons, *TVA* does not provide much direction for resolving GE's procedural due process challenge to CERCLA.

In an analogous regulatory setting, the Second Circuit found that EPA's issuance of a compliance order under a provision of the Clean Air Act, 42 U.S.C. § 7413(a)(3), did not amount to a deprivation of property or liberty. *See Asbestec Constr. Servs., Inc. v. U.S. EPA*, 849 F.2d 765, 770 (2nd Cir. 1988). There, the compliance order issued by EPA found that the plaintiff was in violation of the Clean Air Act, and required compliance in future asbestos abatement projects. *Id.* at 767. Failure to comply with the order could result in EPA court action. *Id.* As GE does here, the plaintiffs in *Asbestec* argued that the issuance of the compliance order without a prior administrative hearing amounted to a deprivation of property or liberty without a hearing in contravention of the Fifth Amendment. *Id.* at 769. The Second Circuit rejected that argument, concluding instead that the issuance of a compliance order did not result in a deprivation of property or liberty and therefore the due process requirements of the Fifth Amendment were not implicated. *Id.* at 770. This Court reaches a similar conclusion with respect to the issuance of a UAO under section 106 and GE's textual challenge.

B. Sufficiency of Judicial Hearing

GE also asserts that regardless of whether there is a hearing before or after the issuance of a UAO,

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[8] The *TVA* decision did note that other courts that have assessed the constitutionality of an EPA order under the Clean Air Act or the Clean Water Act have concluded that such orders do not constitute a deprivation of liberty or property. 336 F.3d at 1257 n.34.

CERCLA's regime still violates due process because it never provides a meaningful judicial hearing to a PRP. According to GE, CERCLA's statutory scheme does not require EPA to bear the burden of persuading an impartial decision-maker that the specific section 106 order was the appropriate remedy, because EPA's decision to issue a UAO can only be challenged under the arbitrary and capricious standard of the Administrative Procedure Act ("APA"). *See* Pl. Opp. at 19. Review under the APA is based upon an administrative record compiled by EPA, without any specific opportunity for the PRP to present evidence. The APA procedure for review of EPA's decision to issue a UAO, GE argues, does not satisfy the requirements of due process.

There are two primary flaws in GE's attack. First, EPA is required under CERCLA to prove de novo in a federal court that the PRP is in fact the liable party. *See Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994) ("Congress . . . has designated the courts and not EPA as the adjudicator of the scope of CERCLA liability"). Although this feature does not fully address GE's concern regarding APA review of EPA's selection of a section 106 order, the ability of the PRP to obtain de novo review of liability under CERCLA certainly provides a meaningful opportunity for judicial review. *See id.* at 1107 (EPA receives deference in its determination of appropriate clean up action, but courts decide liability issues). The second flaw in GE's argument is that it is well established that judicial review under the APA satisfies the requirements of due process. *See, e.g., Unification Church v. Attorney General*, 581 F.2d 870, 878 (D.C. Cir. 1978). Contrary to GE's assertion, moreover, the arbitrary and capricious standard of review does not necessitate a trial-like administrative procedure, and

is sufficient to ensure GE's due process rights. *See Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1410-11 (5th Cir. 1987) ("court review of agency action under the arbitrary or capricious standard is adequate to assure against the risk of mistaken deprivations"). Because the text of CERCLA clearly provides for a judicial hearing under an APA standard of review, *see* 42 U.S.C. § 9606(b)(2)(D), GE cannot sustain a constitutional challenge under the theory that CERCLA never provides a meaningful hearing to a PRP subject to a section 106 order.

C. *Ex Parte Young*

On a related theme, GE next argues that the fines and penalties under sections 106 and 107 of CERCLA, which a PRP may incur if it does not comply with a UAO, are so coercive that the PRP is effectively forced to forgo judicial review of the UAO, and hence amount to a violation of procedural due process under *Ex Parte Young* and it progeny. As discussed above, under 42 U.S.C. § 9606(b)(1) a PRP that refuses to comply with a section 106 order faces fines up to $25,000 a day for each day it does not comply with the order. And if a PRP does not comply, and the EPA decides to conduct the cleanup itself, the PRP could face punitive damages up to three times the cost of clean up, in addition to the daily civil fines. *See* 42 U.S.C. § 9607(c)(3). Finally, the statute permits EPA to control the timing of any judicial intervention; thus, a PRP may incur years of accumulated fines before EPA completes the clean up and finally decides to seek a court order. GE argues that this coercive penalty structure in CERCLA amounts to a procedural due process violation under *Ex Parte Young* because PRPs are forced to incur enormous penalties as the price for pursuing judicial review.

A statutory scheme that imposes penalties when one seeks judicial review is unconstitutional if "the penalties for disobedience are by fines so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation." *Ex Parte Young*, 209 U.S. at 147. However, one firmly recognized method of saving a statute that imposes penalties upon a party seeking judicial review is to provide for a "good faith" defense. *See Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964) (penalty provision of tax code was not due process violation because party did not face penalties if the challenge was made in good faith); *see also Oklahoma Operating Co. v. Love*, 252 U.S. 331, 338 (1920). Under section 9606(b)(1), the daily penalties for a failure to comply with a UAO will only be imposed by the district court if the PRP fails to comply "without sufficient cause." Furthermore, the district court, even if it finds that the PRP lacked sufficient cause to challenge the order, retains discretion whether to impose civil penalties or punitive damages, because the statute dictates the court "may" impose fines or penalties. *See* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3).

The availability of judicial discretion in combination with a "sufficient cause" defense under CERCLA cures any potential constitutional deficiency based on *Ex Parte Young*. Other courts that have addressed this issue under CERCLA have found that the "sufficient cause" defense cures any possible constitutional problems stemming from the fines and penalties possible under sections 106 and 107. *See Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995) ("The risk of losing and being made to pay heavy sanctions, a risk mitigated by the defense of sufficient cause . . . would not violate the Constitution . . .."); *Solid State Circuits, Inc. v. EPA*,

812 F.2d 383, 391 (8th Cir. 1987) (treble damages under section 107(c)(3) are constitutional because of "sufficient cause" defense); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2nd Cir. 1986) (willfulness standard of section 9606(b) amounts to the requisite good faith defense). This Court agrees.

GE contests the efficacy of the "sufficient cause" defense because a PRP is required to risk potentially millions of dollars in fines and penalties on a speculative judicial decision. Along this line, GE argues that the "sufficient cause" defense has not been so fully developed in case law as to provide PRPs with any comfort in their ability to meet the standard and avoid escalating penalties. GE further contends that section 106(b)(1) is deficient because it does not limit the time by which EPA must bring an enforcement action, and thus one could potentially face years of accumulating daily fines before EPA sought enforcement. Although GE raises legitimate concerns regarding the timing of EPA's section 106(b)(1) enforcement effort, whether it is a one day penalty or a one thousand day penalty, the challenging party can still avoid it by showing it had "sufficient cause" to refuse compliance with the section 106 order. Moreover, the party may persuade a judge to exercise discretion by not imposing fines even if the party fails to meet the sufficient cause standard. GE's concerns may, on the other hand, warrant development in its pattern and practice case. The Court concludes, however, in line with the considerable precedent cited above, that this timing issue does not condemn the section 106 UAO scheme under the Fifth Amendment based on GE's textual challenge to CERCLA.

D. *Salerno* Doctrine

In addition to its direct response to GE's facial constitutional challenge, EPA also argues that GE's textual claim must be assessed under the *Salerno* doctrine, which instructs a court to uphold a statute against a facial constitutional challenge if the plaintiff cannot show that the statute is unconstitutional in every application. *See Salerno*, 481 U.S. at 745; *Nebraska*, 331 F.3d at 998. EPA asserts that GE essentially concedes that section 106 would be constitutional when applied in true emergency situations and therefore GE's textual challenge must fail. *See* Def. Mot. at 19 (citing Am. Compl. ¶¶ 2, 5, 16, 29). EPA also argues that when a PRP does not contest EPA's determination of liability, there is no procedural infirmity. *See Chemical Waste Mgmt.*, 56 F.3d at 1437. GE, on the other hand, resists EPA's application of *Salerno*, noting that the doctrine is generally limited to challenges involving hypothetical ways in which a statute may be applied *see* Pl. Opp. at 35, and that the *Salerno* doctrine has never been applied in a case of this type in this Circuit.

GE's protests to the application of *Salerno* are founded on its belief that the doctrine is inappropriate for its pattern and practice claim. On this point, GE may be correct.[9] However, for GE's textual

[9] The Court is not aware of a case where the Salerno doctrine was applied to a non facial challenge to a statute. Other courts have noted that the rigorous Salerno doctrine is applied to facial challenges because facial challenges to a statute are generally discouraged, at least outside of the First Amendment overbreadth setting. See *Women Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 218 (6th Cir. 1997) (Boggs, J., dissenting) ("the Salerno Court rested its holding on the long recognized proposition that, except in the First Amendment context, facial challenges to statutes are disfavored"); *Sanjour v. EPA*, 984

challenge to CERCLA, applying *Salerno* remains appropriate. *See Chemical Waste Mgmt.*, 56 F.3d at 1437 (applying *Salerno* doctrine to facial challenge to EPA's off-site rule). Although the Supreme Court in *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), debated the appropriateness of *Salerno*'s "no set of circumstances" prong, this Circuit has continued to apply *Salerno* in appropriate circumstances, *see Nebraska*, 331 F.3d at 998, and GE's textual challenge to CERCLA appears to be one of those circumstances. It is not for this Court to disregard D.C. Circuit application of Supreme Court precedent simply because some Justices have expressed passing concern about aspects of *Salerno*.

Applying the *Salerno* requirement that GE establish that section 106 is not constitutional in any set of circumstances, GE's textual challenge must fail. As discussed above, the language of section 106 does not create an unconstitutional deprivation of property, nor is it unconstitutionally coercive. But even if GE were right that section 106 by its text offends due process in some settings, the Court can envision at least one scenario whereby section 106 would be constitutional—true emergency situations. Earlier in these proceedings, GE appeared to concede as much. *See* EPA Mot. at 19-20. In an environmental emergency, even if the issuance of a section 106 order constituted a deprivation of property, the lack of a pre-deprivation hearing would not violate due process. *See Hodel*, 452 U.S. at 300 (denying due process

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F.2d 434, 442 (D.C. Cir. 1993) (noting that Salerno is one of the exceptions to the general rule that "facial challenges to legislation are generally disfavored." (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223, 110 S.Ct. 596, 603, 107 L.Ed.2d 603 (1990))).

challenge to statute, noting that in an emergency the agency may affect a deprivation without a hearing). That constitutional application of the section 106 UAO regime defeats GE's facial textual challenge under *Salerno*.

CONCLUSION

For the above reasons, EPA's motion for summary judgment on GE's textual challenge to CERCLA is granted. However, the Court concludes that GE has also pled a "pattern and practice" challenge to EPA's administration of CERCLA, which survives the jurisdictional limitation of section 113(h). That claim has not been contested by EPA in its current motion, and it remains viable under the earlier D.C. Circuit opinion in this case. Therefore, GE may proceed with discovery on that claim. A separate order has been issued.

APPENDIX E

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

No. 03-5114.

GENERAL ELECTRIC COMPANY,
Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL O. LEAVITT, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,
Appellees.

Argued Nov. 20, 2003.
Decided March 2, 2004.

Before: GINSBURG, Chief Judge, and ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed PER CURIAM.

PER CURIAM: The General Electric Company appeals the dismissal of its amended complaint alleging that the administrative orders regime of §§ 106, 107(c)(3), and 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607(c)(3), and 9613(h), violates the Due Process Clause of the Fifth Amendment. The only issue on appeal is whether the district court erred in dismissing the amended complaint for lack of subject matter jurisdiction under § 113(h). We hold that the plain text of § 113(h) does not bar GE's facial constitutional

challenge to CERCLA and accordingly, we reverse and remand the case to the district court.

Congress enacted CERCLA to address "environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). The statute grants the President and, by delegation, the Administrator of the Environmental Protection Agency ("EPA"), "broad power to command government agencies and private parties to clean up hazardous waste sites" by or at the expense of the parties responsible for the contamination. *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). At issue is CERCLA's provision on the timing of judicial review. Section 113(h), 42 U.S.C. § 9613(h), provides, with five exceptions not relevant here, that:

> No federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review *any challenges to removal or remedial action selected* under section 9604 of this title, *or* to review *any order issued under section 9606(a)* of this title, in any action except one of the following [exceptions]. . . . (emphasis added).[1]

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[1] The five enumerated exceptions in § 113(h) are: (1) actions under CERCLA § 107 to recover response costs or damages or actions for contribution; (2) actions to enforce § 106(a) orders or to recover a penalty for violation of such orders; (3) actions for reimbursement under § 106(b)(2); (4) citizen suits under 42 U.S.C. § 9659 alleging that the removal or remedial action taken under CERCLA § 104 violated statutory requirements; and (5) actions under § 106 in which the United States has moved to compel a remedial action.

CERCLA § 104, the first section referenced in § 113(h), authorizes EPA, whenever any hazardous substance is released or is threatened to be released into the environment, to undertake two types of response actions: (1) to remove or arrange for the removal of the hazardous substance; and (2) to provide for remedial actions relating to the release or "substantial threat of release" of the substance. 42 U.S.C. § 9604. Removal actions are short-term remedies, designed to cleanup, monitor, assess, and evaluate the release or threatened release of hazardous substances. Remedial actions are longer-term, more permanent remedies to "minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." CERCLA § 101, 42 U.S.C. § 9601. EPA is authorized to select a particular response action and develop an administrative record without conducting an adjudicatory hearing. *Id.* § 113(k)(2)(c). Potentially responsible parties ("PRPs"), like GE, can participate in a notice and comment process and attend a public meeting in the affected area before EPA lists a particular site on the National Priorities List, develops an administrative record, and makes a final selection of the appropriate response action. *See id.* § 113(k)(2), 42 U.S.C. §§ 9613(k)(2), 9605(a)(8)(b).

CERCLA § 106(a), the second section referenced in § 113(h), involves EPA's authority to issue unilateral orders to PRPs. 42 U.S.C. § 9606(a). CERCLA provides a number of options for EPA to accomplish the clean-up work. First, EPA may perform the work itself and then file in the district court to recover its response costs from the PRP pursuant to CERCLA § 107. *See* CERCLA § 104, 42 U.S.C. § 9604(a); CERCLA § 107, 42 U.S.C. § 9607 (a)(4)(A). Second,

EPA may initiate settlement negotiations. *See* CERCLA § 122, 42 U.S.C. § 9622. Third, under § 106(a), EPA may issue unilateral administrative orders ("UAOs") after notice to the affected state, directing the responsible parties to clean up the hazardous sites "as may be necessary to protect public health and welfare and the environment." CERCLA § 106(a), 42 U.S.C. § 9606(a). Before issuing a UAO, EPA must determine "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." *Id.* If a party fails to comply, EPA may file a civil action in the district court to enforce the UAO. *Id.* Under the UAO regime, a PRP may perform the required work and then petition EPA to recoup its costs; if EPA refuses to pay the PRP can sue the agency in the district court. *Id.* § 9606(b)(2)(A) & (B). Fourth, in the case of imminent threat or harm, EPA may file suit in the district court to compel the PRP to abate the danger or threat. *Id.*

CERCLA establishes various penalties, including punitive damages, in the event of noncompliance with a UAO by a PRP. Under § 106(b), the district court may, in the absence of "sufficient cause," impose daily fines of up to $27,500 for a willful violation, refusal, or failure to comply with a UAO. 42 U.S.C. § 9606(b)(1); 40 C.F.R. § 19.4. In addition, under § 107(c)(3), the court may impose punitive damages "in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action." *Id.* § 9607(c)(3).

GE filed suit against the Administrator of EPA and EPA seeking a declaratory judgment that the provisions of CERCLA relating to the unilateral administrative orders regime, namely §§ 106(a), 107(c)(3), and 113(h), are unconstitutional under the Due Process Clause of the Fifth Amendment. GE alleged that the combination of the absence of pre-enforcement review and massive penalties for noncompliance with a UAO "imposes a classic and unconstitutional Hobson's choice: Either do nothing and risk severe punishment without meaningful recourse or comply and wait indefinitely before having any opportunity to be heard on the legality and rationality of the underlying order." Am. Compl. at ¶ 4. EPA moved to dismiss the amended complaint for lack of jurisdiction on the ground that § 113(h) postpones judicial review of any action under CERCLA until EPA seeks to enforce its remedial orders in court or the PRP sues to recoup its expenses for undertaking the clean-up. Alternatively, EPA moved for summary judgment on the grounds that there was no violation of due process, and that a facial attack on CERCLA would fail because there were circumstances in which the UAO regime could be applied in a constitutional manner. The district court dismissed GE's amended complaint for lack of subject matter jurisdiction under § 113(h), concluding that GE's facial constitutional claim was the type of pre-enforcement challenge that Congress intended to preclude. *General Electric Co. v. Whitman*, 257 F. Supp.2d 8, 31 (D.D.C. 2003).

II.

This court's review of the order dismissing GE's amended complaint for lack of subject matter jurisdiction is *de novo*. *Stokes v. Cross*, 327 F.3d 1210,

1214 (D.C. Cir. 2003); *Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867, 871 (D.C. Cir. 2002); *Ryan v. Reno*, 168 F.3d 520, 521 (D.C. Cir. 1999). For the reasons that follow, we begin and end with the language of § 113(h), because when the statutory text is straightforward, there is no need to resort to legislative history. *See United States v. Gonzales*, 520 U.S. 1 (1997); *Ratzlaf v. United States*, 510 U.S. 135, 147-48, (1994); *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

The plain text of § 113(h) affords no indication that Congress intended to preclude all pre-enforcement review of constitutional challenges to the CERCLA statute. Section 113(h) divests federal courts of jurisdiction to entertain "any challenges to removal or remedial action selected under [§ 104 of CERCLA] or to review any order issued under [§ 106(a) of CERCLA]." 42 U.S.C. § 9613(h). Congress thus enumerated only two types of challenges over which federal courts lack jurisdiction—challenges to § 104 actions and § 106(a) orders. Although, § 113(h) refers broadly to "any challenges," the plain language does not bar "any challenge," without qualification. Instead, § 113(h) focuses on "any challenges" to removal or remedial actions under §§ 104 and 106(a), as well as "any enforcement activities related to" response actions. 42 U.S.C. § 9601(25) (defining removal and remedial actions to "include enforcement activities related thereto.").

GE's due process challenge to CERCLA's administrative orders regime is not a challenge to the way in which EPA is administering the statute in any particular removal or remedial action or order, but rather it is a challenge to the CERCLA statute itself. As such, GE's facial constitutional challenge does not

fit within the plain text of § 113(h)'s reference to "any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title." Although GE and EPA have ongoing interactions over remediation at several locations, *see General Electric*, 257 F. Supp. 2d at 24, GE's lawsuit does not challenge any particular action or order by EPA. The district court's conclusion that GE's facial constitutional challenge is barred by § 113(h) renders much of this provision surplusage: gone is the limitation to challenges to removal or remediation actions. *See Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 645 (D.C. Cir. 2000).

We therefore agree with the plain text interpretation of the en banc court in *Reardon v. United States*, 947 F.2d 1509, 1515 (1st Cir. 1991), that § 113(h) does not bar pre-enforcement review of facial constitutional challenges to CERCLA. While "[a] constitutional challenge to EPA administration of the statute may be subject to [§ 113(h)]'s strictures," because GE's claim does not challenge a removal or remedial action selected under § 104 or an order issued pursuant to § 106(a), GE's amended complaint sets forth a "constitutional challenge to the CERCLA *statute* [that] is not covered by [§ 113(h)]." *Id. See also Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 666 (7th Cir. 1995). EPA's effort to question the holdings of these cases is to no avail. Although it is true, as EPA suggests, that the First Circuit, in view of the particular circumstances of that case, *see Reardon*, 947 F.2d at 1515 n.1, applied the canon of statutory interpretation requiring Congress to speak clearly when it seeks to preclude judicial review of constitutional claims, *see id.* at 1514-15, we have no trouble agreeing with the *Reardon* court's plain

language interpretation of § 113(h) here, *id.* at 1514, where we have no need to apply this interpretative canon ourselves. In addition, despite the district court's contrary conclusion, *Reardon*'s reasoning was not confined to CERCLA's lien provisions but turned on the distinction between challenges to EPA's administration of CERCLA, and challenges to CERCLA itself. *Id.* at 1515. And while, as EPA notes, the opinion in *Wausau* did not address the particular arguments raised here, the Seventh Circuit held that a due process challenge to CERCLA "is not precluded by those [§ 113(h)] limitations" because it was "a proper invocation of nonstatutory review." *Wausau*, 52 F.3d at 666.

Even if § 113(h) were ambiguous regarding constitutional challenges, our holding that GE's constitutional challenge is not barred by § 113(h) would comport with precedent distinguishing between facial, or "systemic," and as-applied, or particularized challenges. For example, in *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974), a provision barring review of individual veterans benefit determinations did not bar a constitutional challenge to the statute itself. The Court distinguished "those decisions of law or fact that arise in the administration by the Veterans' Administration of a statute providing benefits for veterans" from constitutional challenges to "a decision of Congress." *Id.* at 367. This circuit, like others, has followed *Robison* and its progeny. *See, e.g.*, *Lepre v. Dep't of Labor*, 275 F.3d 59, 67-68 (D.C. Cir. 2001); *Nat'l Coalition To Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001); *Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994); *Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992); *Greenwood v. United States*, 858

F.2d 1056, 1059 (5th Cir. 1988); *Marozsan v. United States*, 852 F.2d 1469, 1474 (7th Cir. 1988) (en banc).

More recently, in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), the agency had argued that a lawsuit challenging the manner in which the Special Agricultural Worker ("SAW") provision was being administered was barred as an application for adjustment of status. The Supreme Court disagreed. Looking to "[t]he critical words" of the immigration statute that barred review "of a *determination* respecting *an application*" for SAW status, the Court observed that the words referred only to review of "a single act rather than a group of decisions or a practice or procedure employed in making decisions." *Id.* at 492. This made clear, the Court concluded, that Congress was referring to denials of individual applications for SAW status, not "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.* As is no less true for CERCLA, the Court in *McNary* stated, "had Congress intended the limited review provisions of § 210(e) of the [immigration statute] to encompass [systemic, collateral] challenges to [agency] procedures and practices, it could easily have used broader statutory language," referencing other statutes barring judicial review of "all causes" and of "all questions of law and fact." *Id.* at 494.

Even though these decisions, which involved statutes precluding judicial review altogether, applied an interpretive canon that we need not apply here, *see McNary*, 498 U.S. at 496-99; *Robison*, 415 U.S. at 366-67, the distinction they draw between systemic and particularized challenges nevertheless supports

our interpretation of the plain text of CERCLA § 113(h).

To the extent that other courts have concluded a constitutional claim is barred by § 113(h), they have done so in cases involving challenges to specific EPA orders and actions, *see Oil Chem. & Atomic Workers Int'l Union v. Richardson*, 214 F.3d 1379 (D.C. Cir. 2000); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 327 (9th Cir. 1995); *Schalk v. Reilly*, 900 F.2d 1091, 1094 (7th Cir. 1990); *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1390 (5th Cir. 1989), or they have not focused on the plain text of § 113(h), *see Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 293 (6th Cir. 1991); *Schalk*, 900 F.2d at 1094; *South Macomb Disposal Auth. v. EPA*, 681 F. Supp. 1244, 1251 (E.D. Mich. 1988). EPA's reliance on *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1 (2000), is similarly unhelpful to its position. First, the text of the statute in that case was much broader in scope, prohibiting direct judicial review of any action "to recover on any claim arising under" the Medicare Act. *See id.* at 6. Second, because the text of the provision at issue, "if read alone, [was] uncertain," *id.* at 10, the Court relied upon congressional purpose and its own precedents interpreting the Medicare Act in concluding the Act barred review of claims that certain regulations violated the Due Process Clause. *Id.* at 10-15. Thus, *Illinois Council* is simply inapposite.

The plain language of section § 113(h) bars pre-enforcement review of agency actions only under §§ 104 and 106(a) of CERCLA. And while EPA would have the court distinguish *McNary* on the ground that, unlike CERCLA § 113(h), which merely postpones judicial review, the immigration statute barred

all judicial review of application denials and particular agency actions, the Court's reasoning in *McNary* was based on an interpretation of the plain text of the statute; EPA has pointed to no principle that would make the distinction between facial and as-applied constitutional challenges any less relevant to a statute barring pre-enforcement review of certain agency actions than to a statute precluding all judicial review.

For EPA to prevail, then, in contending that Congress intended to preclude pre-enforcement constitutional challenges to the CERCLA statute, in contravention of the plain text of § 113(h), it "must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). *See also Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). EPA fails to meet this burden. EPA propounds a "functional" interpretation, maintaining that, in light of the congressional purposes underlying § 113(h), the applicability of § 113(h) "turns not on the formal nature of the suit, but on the functional question whether the suit would interfere with a response action—or, as here, *many* response actions." Appellees' Brief at 19. For support, EPA culls CERCLA's legislative history and points to a floor statement by a single senator that § 113(h) covers "all lawsuits, under any authority, concerning the response actions that are performed by EPA." 132 Cong. Rec. 28,441 (1986). This statement contrasts with the House, Senate and Conference Reports, *see* H.R.Rep. No. 99-253(V), at 25-26 (1985); S.Rep. No. 99-11 at 58 (1985); H.R. Conf. Rep. No. 99-962, at 224 (1986), which refer to legal challenges to the selection

and implementation of particular response actions, and thus the senator's statement is hardly persuasive evidence of congressional intent. *See Garcia v. United States*, 469 U.S. 70, 76 (1984); *United States v. Ray*, 21 F.3d 1134, 1138 (D.C. Cir. 1994). In any event, the EPA's functional approach ignores the plain language of § 113(h), which limits the bar to any challenges to removal or remedial actions under § 104 or any orders under § 106(a), not to facial constitutional challenges to the CERCLA statute itself.

Finally, our interpretation of § 113(h) "does not necessarily run counter to the purposes" underlying that provision. *Reardon*, 947 F.2d at 1515. The concern expressed by the district court, and echoed by EPA on appeal, was that, if successful, GE's constitutional challenge would have the effect of hindering or delaying EPA's cleanup of hazardous waste sites, undermining Congress' goals in enacting section 113(h). *General Electric*, 257 F. Supp. 2d at 23. Or, as EPA contends, GE's pre-enforcement constitutional challenge is within the scope of § 113(h) because a challenge to the CERCLA statute is inherently a challenge to a response action when the relief sought would have the effect of interfering with EPA's ability to issue orders and enforce clean-up operations. These concerns cannot be lightly dismissed given the nature of the hazards to health and the environment addressed by CERCLA, and Congress' overriding goal of preventing delays in the cleanup of hazardous waste sites. However, the adjudication of a pre-enforcement constitutional challenge to CERCLA's UAO regime will not necessarily frustrate Congress' intent and, therefore, reliance on congressional purpose cannot overcome our interpretation of the plain text of the statute. A decision on GE's due process claim that is favorable to GE would afford

EPA an opportunity to provide due process review at an early stage. A decision rejecting GE's due process claim would remove a later impediment to EPA's enforcement action. In addition, as the First Circuit observed, the usual practical considerations counseling against pre-enforcement review are not present in the adjudication of a facial due process claim; it is a purely legal issue whose resolution does not depend on the type of information available only after site clean-up is completed, and does not have the potential of producing inconsistent programmatic results. *See Reardon*, 947 F.2d at 1515.

Because Congress's meaning as reflected in the plain text of § 113(h) is compatible with the structure of CERCLA's administrative order regime, our inquiry is at an end, *see Gonzales*, 520 U.S. at 6, and we need not resort to the doctrine of constitutional avoidance to support our interpretation of the text. *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 134-35 (2002); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 484 (2001). Accordingly, we hold, in light of the qualified scope of the judicial review bar in § 113(h), that the district court erred in dismissing GE's amended complaint for lack of subject matter jurisdiction, and we remand the case to the district court to address the merits of GE's facial due process claim.

APPENDIX F

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

No. CIV.A.00-2855(JDB).

GENERAL ELECTRIC COMPANY,
Plaintiff,

v.

CHRISTINE TODD WHITMAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants.

March 31, 2003.

MEMORANDUM OPINION

BATES, District Judge.

Plaintiff General Electric Company ("GE") and defendants the United States Environmental Protection Agency and its administrator, Christine Todd Whitman (collectively "EPA"), are before the Court on EPA's motion to dismiss or for summary judgment. GE raises a broad constitutional challenge to section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), 42 U.S.C. § 9601 *et seq.*, and seeks a declaratory judgment that section 106, 42 U.S.C. § 9606, in tandem with sections 107(c)(3) and 113(h), 42 U.S.C.

§§ 9607(c)(3), 9613(h), creates a regime that violates the Due Process Clause of the Fifth Amendment. Amended Complaint at ¶ 1.

EPA urges dismissal of GE's action on the ground that section 113(h) postpones judicial review of any challenges to EPA action under CERCLA—including constitutional challenges to the statute itself—until EPA seeks to enforce its remedial actions in court. Even if there is jurisdiction to review GE's challenge at this time, EPA contends that these sections of CERCLA do not violate GE's due process rights. EPA also argues that GE's challenge constitutes a facial attack on CERCLA that cannot prevail because there are circumstances in which the challenged provisions plainly could be applied in a constitutional manner.

GE counters that it is not seeking pre-enforcement review of any specific EPA order, which it concedes would be barred until EPA seeks enforcement in court, nor is it pursuing a purely facial challenge to CERCLA. Rather, GE asserts that it is challenging the constitutionality of CERCLA's statutory scheme as "interpreted and applied" generally by EPA. As a result, GE contends that the jurisdictional bar under section 113(h) does not apply here.

As to the merits, GE argues that CERCLA's provisions violate due process by failing to provide a hearing and other procedural safeguards before EPA issues an administrative order requiring remediation of a hazardous waste site. GE notes that if one refuses to comply with an administrative order, one risks considerable penalties, including punitive damages; alternatively, EPA may complete the remediation itself, and then seek recovery of its costs, plus treble damages, from the non-complying party. And even if one complies with a cleanup order, one

can only seek reimbursement of expenses from EPA in court once EPA determines the site is completely remediated, which is often several years later. Thus, GE contends, there is no assurance that there will be a prompt post-order hearing in court. Moreover, GE maintains that EPA issues such orders, without hearings or other procedural safeguards, even when there is no emergency warranting immediate remediation. GE contends that CERCLA thus amounts to a coercive regime that creates a "Hobson's choice" for parties faced with section 106 orders under CERCLA: comply with EPA's order without receiving a hearing on EPA's proposed remedy, or refuse and risk stiff and mounting penalties.

Upon consideration of the pleadings, the briefing (including briefs by *amicus curiae*),[1] oral argument, and the entire record herein, the Court finds that, in light of section 113(h), it does not have subject matter jurisdiction over GE's broad, pre-enforcement constitutional challenge to CERCLA. Because this Court concludes that section 113(h) bars judicial review at this time, the Court does not address the merits of GE's due process claim. Therefore, the Court grants EPA's motion to dismiss.

BACKGROUND

I. The CERCLA Framework

Congress designed CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524

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[1] *Amicus* briefs were filed with the Court by the Natural Resources Defense Council, Inc., Hudson River Sloop Clearwater, New York Rivers United, Riverkeeper and Scenic Hudson, the Chamber of Commerce of the United States, Washington County CEASE, Inc., and the American Chemistry Council.

U.S. 51, 55 (1998). As its name implies, CERCLA is "a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). Also known as the Superfund law, CERCLA provides the President (typically through the Administrator of EPA) with extensive authority to enforce the cleanup provisions of the Act. CERCLA requires that sites contaminated by toxic wastes be abated and cleaned up expeditiously by, or at the expense of, "those responsible for the hazardous condition." *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 (8th Cir. 1995). "These actions typically require private parties to incur substantial costs in removing hazardous wastes and responding to hazardous conditions." *Key Tronic*, 511 U.S. at 814. Those subject to liability for cleanup orders under CERCLA are referred to as "potentially responsible parties," or PRPs. *See* 42 U.S.C. § 9607(a). In order to be effective, CERCLA authorizes EPA to address contaminated sites without first having to undergo judicial review of issues relating to liability or the adequacy of the cleanup remedy. *See Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3rd Cir. 1991); 42 U.S.C. § 9613(h).

The Act "allow[s] the EPA to undertake direct removal or remedial action to protect the public health or welfare or the environment when it determines that release of a hazardous substance poses an imminent and substantial danger." *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 290-91 (6th Cir. 1991). CERCLA contemplates two distinct kinds of clean-up actions arising under its statutory framework: removal actions and remedial actions. *See* 42 U.S.C. §§ 9601(23)-(24). Removal actions, which occur before remedial action is undertaken, are short-term actions

taken to halt any immediate risks posed by hazardous wastes, and often involve actions to study, monitor, evaluate, clean up and otherwise "prevent, minimize, or mitigate damage to the public health or welfare or the environment." *Id.* § 9601(23). Remedial actions are more permanent remedies and measures taken to clean up contamination, actions "taken instead of or in addition to removal actions." *Id.* § 9601(24). Remedial actions include investigation, testing, storage, abatement, confinement, repair, excavation, dredging, relocation, incineration, "and any monitoring reasonably required to . . . protect the public health and welfare and the environment." *Id.*

Hazardous waste sites that pose the greatest danger to public health and the environment are listed on the National Priorities List (NPL). *See Ohio v. EPA*, 838 F.2d 1325, 1327 (D.C. Cir. 1988). Sites listed on the NPL "are considered the leading candidates for cleanup financed by the Superfund program." *Washington State Dep't of Transp. v. EPA*, 917 F.2d 1309, 1311 (D.C. Cir. 1990); *see also* 42 U.S.C. § 9605(a)(8)(B). EPA has listed at least three sites on the NPL with respect to which EPA considers GE to be a PRP or otherwise liable under CERCLA. *See* 40 C.F.R. Pt. 300, App. B. Before EPA can propose remedies for site cleanup and abatement, information is obtained, data gathered, remediation investigated, and alternative options considered. *See* 40 C.F.R. §§ 300.430, 300.5. Moreover, before EPA selects a remedy, the public, the community, neighbors, interested parties, and all PRPs have several opportunities to comment (in writing and at hearings) on the proposed remedy. *Id.* at § 300.430(f).

Section 122 of CERCLA authorizes EPA to initiate negotiations with PRPs to "allow [for the] expedient

and efficient settlements of potential liability." *Dravo Corp. v. Zuber*, 13 F.3d 1222, 1227 (8th Cir. 1994); 42 U.S.C. § 9622. If negotiations fail, one option under CERCLA for cleaning a hazardous waste site is for EPA to perform the remediation itself, using money taken out of the Superfund established by Congress. EPA would then bring an action in federal district court under section 107 of CERCLA to recover its costs from parties responsible for the contamination. *See* 42 U.S.C. §§ 9607(a)(4)(A), 9611(a). Given the limited funds available in the Superfund in relation to the enormity of the hazardous waste problem nationwide, cost recovery actions under section 107 are critical for replenishing the Superfund. *See Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 388 (8th Cir. 1987).

On the other hand, section 106 allows EPA to order parties to clean a site contaminated with hazardous waste, and to file a civil action in federal district court to compel a party to comply with EPA's proposed remedy. 42 U.S.C. § 9606(a). The section 106 administrative orders lie at the heart of GE's due process challenge in this case. *See* Am. Compl. ¶ 2. Before issuing a section 106 order, however, EPA must determine "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a). Given the imminent nature of the potential danger to the public welfare and the environment, CERCLA does not require EPA to provide a hearing prior to issuing a section 106 order. Under the penalty provision of section 106(b), any person who, "without sufficient cause," willfully violates a section 106 order, or fails or refuses to comply with such an order, may be fined up to

$27,500 for each day the violation or non-compliance continues—a very strong incentive to encourage quick compliance. *Id.* § 9606(b). In addition, under section 107, a party who fails to comply with a section 106 order also faces the possibility of punitive damages up to three times "the amount of any costs incurred by the [Superfund] as a result of such failure to take proper action." *Id.* § 9607(c)(3).

But these fines and damages are not automatic; EPA must bring a civil action in district court to compel compliance with its order. Even then, the district court has discretion as to whether noncompliance warrants a fine, penalties, or punitive damages, and if so, how much. *Id.* The non-complying party has the opportunity at this stage to raise all challenges to a section 106 order, including challenges to the appropriateness of EPA's selected remedy for abatement of the site, claims that a party is not liable for the site or waste, assertions that EPA failed to follow applicable guidelines or regulations, or any other defenses to liability that may be available. This judicial hearing occurs before any recovery costs, fines or penalties are imposed on a party. *See Barmet Aluminum*, 927 F.2d at 294-96; *Solid State Circuits*, 812 F.2d at 389-92. Under the statute, if the district court determines that a party had "sufficient cause" for not complying with the order, no penalties or fines can be imposed. *See* 42 U.S.C. §§ 9606(b), 9607(c)(3).

The scope, nature and limits of judicial review of EPA action under CERCLA are set out in section 113. *See id.* § 9613. The relevant provision here is section 113(h), entitled "Timing of review," which limits—or more precisely postpones—when a challenge may be brought in federal district court to removal or remedial actions or section 106 orders issued by EPA.

Id. § 9613(h). There is, pursuant to section 113(h), no jurisdiction in federal court for such challenges except in five enumerated circumstances: 1) when EPA brings a cost recovery action under section 107; 2) when EPA brings an action to enforce a section 106(a) order or to recover penalties for violations of orders; 3) when a party brings an action seeking reimbursement from EPA under section 106(b)(2); 4) in a citizen suit brought under 42 U.S.C. § 9659; or 5) when EPA brings an action under section 106 seeking to compel a remedial action. The thrust of section 113(h) is that one cannot obtain pre-enforcement review of EPA orders (including section 106 orders) or EPA response actions with respect to a contaminated site.

II. GE's Amended Complaint

GE contends that sections 106, 107(c)(3), and 113(h) of CERCLA work together to create a coercive regime that denies it and other PRPs their due process right to an impartial hearing prior to the issuance of a section 106 order. GE maintains that one subject to a section 106 order "does not receive any prior hearing before the order becomes effective." Am. Compl. ¶ 2. EPA's use of these administrative orders coupled with the threat of substantial fines and penalties, GE claims, is "coercive" and "deprive[s] persons of their ability to challenge the propriety" of such orders in a timely fashion, thereby leaving "no practical choice but to comply." *Id.* Because CERCLA allows EPA such broad latitude, GE argues that EPA controls and manipulates the timing of any post-enforcement review, preventing prompt review of EPA's orders and resulting in delay that undermines any meaningful opportunity for review,

which in turn allows statutory fines and penalties for non-compliance to amass rapidly. *Id.* ¶ 3.

> The [section 106] regime thus imposes a classic and unconstitutional Hobson's choice: Either do nothing and risk severe punishment without meaningful recourse or comply and wait indefinitely before having any opportunity to be heard on the legality and rationality of the underlying order.

Id. ¶ 4.

Under section 107, EPA may implement its own remedy and then seek recovery of the costs of the remediation from PRPs in federal court. Similarly, under section 106(a), EPA may seek an injunction in federal court requiring a person to implement the agency's proposed remedial plan. GE concedes that, in both these situations, "the PRPs receive a timely hearing in court without being forced to do the work first and without being subject to fines and penalties." *Id.* ¶ 15. However, GE contends that under section 106(a) EPA may also issue an administrative order requiring a cleanup "without a hearing upon a finding that 'there is imminent or substantial endangerment to the public health or environment because of an actual or threatened release of a hazardous substance from a facility.'" *Id.* ¶ 16 (quoting 42 U.S.C. § 9606(a)). "It is the use of this unilateral order authority [pursuant to section 106] in concededly non-emergency, non-time-sensitive situations, which is the subject of this complaint." Am. Compl. ¶ 16.[2]

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[2] Section 106(a) authorizes the issuance by EPA of "such orders as may be necessary to protect public health and welfare and the environment." 42 U.S.C. § 9606(a); *see* Exec. Order No.

GE's amended complaint discusses three hazardous waste sites as to which EPA contends that GE is, or may be, responsible for disposal of hazardous waste: 1) a factory building in Hoboken, New Jersey, where GE made mercury vapor lamps in the 1920s and other lighting products until the factory was sold in 1948; 2) two manufacturing facilities in Hudson Falls and Fort Edward, New York, where GE discharged PCBs into the Upper Hudson River well into the 1970s; and 3) Fletcher Paint Works in Milford, New Hampshire, a now-bankrupt company to whom GE sold Pyranol (an oil containing PCBs) from 1956 to 1968 for use in the manufacture of paint. *See* Am. Compl. ¶¶ 31-47. GE's amended complaint details these waste sites and GE's role, or lack of role, in the contamination of the sites. These sites have all been listed on the NPL. *See* 40 C.F.R. Pt. 300, App. B. EPA acknowledges that these sites "are either at or near the stage where remedial action will be selected and implemented." Defs. Motion to Dismiss at 6.

Indeed, EPA has already issued section 106 orders to GE for removal or remediation action at these waste sites. On February 24, 1997, EPA ordered GE to maintain security for the Hoboken site, provide temporary evacuation and housing for the former residents, and provide complete maintenance for the building. Am. Compl. ¶ 33. On April 1, 1998, EPA ordered GE to demolish the factory. *Id.* ¶ 34. At the Hudson River facilities, EPA has listed 40 miles of the Hudson River on the National Priorities List as a Superfund site due to the PCBs discharged into the river. *Id.* ¶ 38. GE's amended complaint states that "the EPA recently announced that it is now

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12580, 52 Fed.Reg. 2923 (Jan. 23, 1987) (delegating President's authority to EPA).

considering dredging projects" to remove the PCBs in the river, a project GE contends will take a decade and cost hundreds of millions of dollars to complete. *Id.* ¶ 41. GE believes "EPA will choose not to implement these projects itself because of the enormous cost and technological challenges that would be involved." *Id.* ¶ 42. "Instead," GE warns, "EPA will invoke CERCLA's unilateral orders regime and require GE to implement a massive dredging remedy." *Id.*

GE thus contends, as illustrated by these examples, that the CERCLA regime is unconstitutional because it permits administrative orders "without prior hearing in cases that do not present urgent circumstances requiring immediate action," and does not allow for a meaningful, prompt judicial hearing once an order is issued. *Id.* ¶ 54. Therefore, GE seeks a declaratory judgment that the use of section 106 orders, in conjunction with sections 107(c)(3) and 113(h), "is unconstitutional as violative of due process." *Id.*

ANALYSIS

GE asserts federal question jurisdiction under 28 U.S.C. § 1331 as the basis for subject matter jurisdiction over its constitutional challenge to CERCLA. EPA counters that pre-enforcement challenges to EPA response actions, even if framed in constitutional terms, are precluded under section 113(h) of CERCLA.

"Because federal courts are courts of limited jurisdiction, a plaintiff may invoke the jurisdiction of a federal court only pursuant to a statutory grant of authority to adjudicate the asserted claim. Moreover, when the plaintiff seeks to sue the United States or an instrumentality thereof, he may not rely on the

general federal question jurisdiction of 28 U.S.C. § 1331, but must identify a specific statutory provision that waives the government's sovereign immunity from suit." *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1021 (3rd Cir. 1997) (en banc) (citations omitted) (finding no subject matter jurisdiction under 28 U.S.C. § 1331 to raise pre-enforcement challenge to section 106 order); *see Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). It is well settled that such waivers of immunity must be "unequivocally expressed," *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)), and are to be "construed strictly in favor of the sovereign," *id.* (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

Congress amended CERCLA in 1986 through the Superfund Amendments Reauthorization Act ("SARA"), adding the timing of review provision in section 113(h) that delays judicial review of any challenges to removal or remedial actions or EPA orders under section 106 until EPA seeks to enforce its orders. Given this clear limitation on pre-enforcement judicial review, this Court must determine whether GE's constitutional attack on CERCLA is the type of pre-enforcement challenge that Congress intended to preclude:

> In cases involving delayed judicial review of final agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is "fairly discernable in the statutory scheme." Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and

purpose, its legislative history, and whether the claims can be afforded meaningful review.

Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994) (citations omitted); *see also Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984) (presumption of judicial review of agency actions is overcome "whenever the congressional intent to preclude review is fairly discernable in the statutory scheme"). Based on the language, structure, purpose, and legislative history of section 113(h), and extensive federal case law applying it, the Court concludes that Congress intended to preclude judicial review of GE's broad, pre-enforcement constitutional challenge to CERCLA's administrative order regime.

I. *Thunder Basin Coal Co. v. Reich*

The jurisdictional analysis of GE's constitutional challenge to CERCLA is informed by the Supreme Court's analysis in *Thunder Basin Coal Co. v. Reich*. There, plaintiffs brought a due process challenge to the Federal Mine Safety and Health Amendments Act, 30 U.S.C. § 801 *et seq.* ("Mine Act"). That Act requires unannounced safety inspections of the nation's mines, and requires that a representative of the miners be given an opportunity to participate in such inspections. 30 U.S.C. § 813(f). Similar to CERCLA, the Mine Act gives the Secretary of Labor broad authority to compel immediate compliance with agency orders issued under the Act through the use of civil penalties and sanctions. Challenges to enforcement under the Mine Act are reviewed by the Mine Safety and Health Review Commission ("Commission"), and then by the appropriate court of appeals. *Id.* § 816(a)(1). When mine workers sought to designate two union officials as their representatives for safety inspections, the mine owner brought suit in

federal district court seeking pre-enforcement injunctive relief. Raising the same "Hobson's choice" due process argument that GE asserts here, the mine owner contended that

> requiring [mine operators] to challenge MSHA's interpretation of 30 U.S.C. § 813(f) and 30 CFR pt. 40 through the statutory-review process would violate the Due Process Clause of the Fifth Amendment, since the company would be forced to choose between violating the Act and incurring possible escalating daily penalties, or, on the other hand, complying with the designations and suffering irreparable harm.

Thunder Basin, 510 U.S. at 205.

The Supreme Court found that this constitutional challenge was precisely "the type Congress intended to be reviewed within the statutory structure." *Id.* at 212. The Court thus held that the Act precluded district court jurisdiction over the owner's pre-enforcement claims, including its constitutional challenge, because such claims must go to the Commission first, and then to the court of appeals for judicial review:

> As for petitioner's constitutional claim, we agree that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." This rule is not mandatory, however . . . . The Commission has addressed constitutional questions in previous enforcement proceedings. Even if this were not the case, however, petitioner's statutory and constitutional claims here can be meaningfully addressed in the Court of Appeals.

Id. at 215 (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)). The Court concluded that "the Mine Act's comprehensive enforcement structure, combined with the legislative history's clear concern with channeling and streamlining the enforcement process, establishes a 'fairly discernable' intent to preclude district court review in the present case." *Id.* at 216. The Court therefore rejected the mine owner's attempt to circumvent the Mine Act's review provisions by pre-emptively challenging the constitutionality of the Act. *Id.*

This case falls well within the rationale of *Thunder Basin*. The Mine Act and CERCLA have similar comprehensive statutory schemes. The former contains a number of incentives "to compel immediate compliance with the Mine Act provisions through the use of mandatory civil penalties, discretionary civil penalties, and other sanctions." *Id.* at 204. Indeed, a mine operator who fails to comply with a citation can be assessed $5,000 per day pending compliance. *Id.* at 204 n. 4 (citing 30 U.S.C. §§ 814(a), 815(a)). Likewise, CERCLA contains provisions which allow EPA to compel compliance with its orders through civil penalties up to $27,500 per day of non-compliance. *See* 42 U.S.C. § 9604(e)(5)(b)(ii); *see also Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2nd Cir. 1998) (CERCLA "was put in place to aid the expeditious resolution of environmental claims. To accomplish this objective Congress employed incentives for potentially responsible parties to settle and strong disincentives for non-settling potentially responsible parties.").

Each act streamlined respective health and safety requirements. *Thunder Basin*, 510 U.S. at 211 ("The 1977 Mine Act thus strengthened and streamlined

health and safety enforcement requirements."); *E.I. Du Pont De Nemours & Co. v. Starzyk*, 1990 WL 205823, * 1 (N.D. Ill., Nov. 26, 1990) ("CERCLA was passed in 1980 to streamline and strengthen the government's role in cleaning up hazardous waste sites."). Originally, however, both statutes were deemed inadequate to compel compliance, and therefore Congress amended each in an effort to limit initial judicial review and strengthen incentives for compliance. *Compare Thunder Basin*, 510 U.S. at 210 n.14 ("Under existing legislation, civil penalties were not always mandatory and were too low to compel compliance, and enforcement was hobbled by a cumbersome review process.") *with United States v. Colorado*, 990 F.2d 1565, 1570 n. 6 (10th Cir. 1993) ("Congress amended CERCLA in 1986 by enacting SARA after realizing that CERCLA was 'inadequate' to address the environmental threat presented by abandoned hazardous waste sites." (citations omitted)).

Expedition and speed are thus critical goals for protecting each statute's respective constituency—miners under the Mine Act, and the public and the environment under CERCLA. *See Thunder Basin*, 510 U.S. at 211 ("Concluding that 'rapid abatement of violations is essential for protection of miners,' Congress accordingly made improved penalties and enforcement measures a primary goal of the [Mine] Act."); *Pritikin v. Dep't of Energy*, 254 F.3d 791, 794-95 (9th Cir. 2001) ("CERCLA was enacted to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites."). Moreover, both statutes allow for judicial review in federal courts, where review of agency action is governed by similar standards. *See* 30 U.S.C. § 815(a)(1)-(2) (review in courts of appeals where agency action will be upheld

if "substantially supported" by the record); 42 U.S.C. § 9613(h)-(j) (review in district court where agency action will be upheld if not arbitrary and capricious). And like CERCLA, the Mine Act has been construed as "preclud[ing] district court jurisdiction over [] pre-enforcement challenge[s]." *Thunder Basin*, 510 U.S. at 207, *see Southern Pines Associates v. United States*, 912 F.2d 713, 716 (4th Cir. 1990) ("In 1986 Congress added a provision to CERCLA which specifically precludes federal jurisdiction over pre-enforcement remedial action.").

Furthermore, GE and the mine owner in *Thunder Basin* assert essentially the same due process challenge to a statutory structure that precludes pre-enforcement challenges to agency orders, yet subjects affected parties to potentially stiff fines for non-compliance with such orders; indeed, each complains of the specter of a coercive, intolerable "Hobson's choice" regarding the dilemma of either complying with an unreviewable agency order or risking stiff penalties. *Compare Thunder Basin*, 510 U.S. at 218, *with* Am. Compl. ¶ 4. To determine whether section 113(h) of CERCLA precludes initial review of GE's constitutional challenge, then, the Court is guided by *Thunder Basin* to the statute's language, structure, purpose, and legislative history, and to whether GE's claims can be afforded meaningful review at a later point.

II. Section 113(h)

The "Timing of review" provision in section 113(h) states as follows:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621

> of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following [listed five exceptions].

42 U.S.C. § 9613(h).[3] "The CERCLA statutory scheme, as amended by SARA, merely serves to effectuate a delay in a plaintiff's ability to have a full hearing on the issue of liability." *Barmet Aluminum*, 927 F.2d at 295; *see ARCO Environmental Remediation, LLC v. Dep't of Health and Quality of Montana*, 213 F.3d 1108, 1115 (9th Cir. 2000).

GE claims that it is not challenging any specific order or removal action, but rather is making a broad (indeed, somewhat abstract) challenge to the CERCLA statutory scheme that somehow falls outside section 113(h):

> Although GE is not here challenging any specific order issued pursuant to the unilateral orders provisions, GE is and will continue to be deprived of its liberty and property by reason of being forced to comply with these provisions. Accordingly, GE seeks a declaration by this Court sustaining GE's basic rights guaranteed by the Constitution.

Am. Compl. ¶ 7. GE admits that it "has been a victim of and is threatened with this unilateral orders

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[3] Under section 113(b) of CERCLA, "the United States district courts shall have exclusive original jurisdiction over all controversies arising under" CERCLA, except as limited by sections 113(a) and 113(h). The five enumerated exceptions to the jurisdictional bar are enforcement or cost-recovery actions filed by EPA or by a private citizen. There is no contention that any of the five exceptions apply here.

regime." *Id.* ¶ 30. But although GE details at length three hazardous waste sites (each on EPA's National Priorities List) where EPA has deemed GE to be potentially responsible or liable for cleanup costs, *see id.* ¶¶ 30-47, it insists that it only refers to them as "examples illustrat[ing] these unconstitutional deprivations, both existing and threatened." *Id.* at 30.

Notwithstanding GE's ardent claim that it is not challenging specific EPA orders, it is apparent that GE's challenge to CERCLA nonetheless falls within the section 113(h) prohibition of "any challenges," "in any action," to EPA removal or remedial action or to "any" section 106(a) order.[4] The language of section 113(h) reflects the broad intent of Congress strictly to limit judicial review of EPA enforcement actions or orders. Congress employed the broad term "any" three times in section 113(h), thereby casting the prohibition on pre-enforcement judicial review in sweeping terms.

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[4] In its opposition brief, GE goes to great lengths to recast its challenge as one to EPA's interpretation and application of CERCLA, *see, e.g.*, Pl. Opp. to Def. Mot. to Dismiss at 17, 53, in an obvious effort to avoid both section 113(h)'s jurisdictional bar to challenges to specific orders and fundamental problems with the merits of a facial challenge to the constitutionality of CERCLA. GE's hybrid attack on a broad category of EPA orders is to no avail, however, as the Court concludes that both as-applied and facial challenges to the CERCLA administrative orders regime are covered by the section 113(h) jurisdictional limitation under the circumstances present here, and hence GE's novel articulation is as well. *See, e.g., GDF Realty v. Norton*, 169 F. Supp. 2d 648, 656 (W.D. Tex. 2001) ("A plaintiff can either challenge *all* applications of a statute (i.e., a facial challenge), or the statute as-applied to the plaintiff's particular conduct-but he cannot take the middle ground and challenge the statute as-applied to a general class of activity into which his conduct also falls." (emphasis in original)).

"Section 113(h) is clear and unequivocal. It amounts to a 'blunt withdrawal of federal jurisdiction.'" *McClellan Ecological Seepage Situation (MESS) v. Perry*, 47 F.3d 325, 328 (9th Cir. 1995) (quoting *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991)); *Oil, Chemical and Atomic Workers, Int'l Union v. Richardson*, 214 F.3d 1379, 1382 (D.C. Cir. 2000) (same). As the Ninth Circuit explained, "the unqualified language of the section precludes 'any challenges' to CERCLA Section 104 clean-ups, not just those brought under other provisions of CERCLA." *MESS*, 47 F.3d at 328. Section 113(h) "explicitly states that federal courts shall not have jurisdiction to review 'any challenge' except for those enumerated." *South Macomb Disposal Auth. v. EPA*, 681 F. Supp. 1244, 1249-50 (E.D. Mich. 1988). "It simply cannot be denied that Congress intended to preclude all litigation which would delay, or worse, halt governmental efforts to clean up hazardous waste sites." *Oil, Chemical & Atomic Workers Int'l Union v. Pena*, 62 F. Supp. 2d 1, 5 (D.D.C. 1999), *aff'd*, 214 F.3d 1379 (D.C. Cir. 2000); *see also Clinton County Comm'rs*, 116 F.3d at 1024 n.1 (noting Congress's "commitment to preventing *all* judicial interference with remedial actions" under CERCLA (emphasis in original)).

When Congress has purposefully employed the term "any" in other statutes, the Supreme Court has recognized the comprehensive scope that the word suggests. In construing the language "any property" in a drug forfeiture statute, the Court stated:

> Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied, or broader words to define the scope of what was to be forfeited.

United States v. Monsanto, 491 U.S. 600, 607 (1989). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third Int'l Dictionary*); *see also United States v. James*, 478 U.S. 597, 605, (1986) ("Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction" (emphasis in original)); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972) ("by the repeated use of the word 'any'" in the statute, the term is "obviously meant to be inclusive").[5]

The sweeping nature of Congress's choice of the terms "*any challenges* " and "in *any* action" supports the conclusion that section 113(h) precludes pre-enforcement due process challenges to CERCLA, and specifically to the procedures available to EPA to compel compliance with its orders. Congress "could not have chosen stronger words to express its intent . . . or broader words to define the scope," *Monsanto*, 491 U.S. at 607, of the challenges to remedial or removal action or section 106 orders precluded under CERCLA's judicial review provision.

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[5] Courts of appeals have also broadly construed the statutory term "any" to mean "all." *See, e.g.*, *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852, 859 (4th Cir. 2002) ("[T]here is no sufficient reason to give the word 'any' a meaning other than its ordinary English usage. That meaning is: 'to any extent; in any degree; at all.' This meaning has been adopted by the courts.") (quoting *Webster's Third New Int'l Dictionary*); *Southern Co. v. FCC*, 293 F.3d 1338, 1349 (11th Cir. 2002) (plain meaning of "any" is "all"); *In re Jove Engineering, Inc. v. IRS*, 92 F.3d 1539, 1554 (11th Cir. 1996) (statute "uses the broad term 'any' which encompasses all forms of orders" and "encompasses *any* type of order, whether injunctive, compensative, or punitive") (emphasis in original).

Indeed, in *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), the Supreme Court reasoned that if Congress had wanted to prohibit review of constitutional due process and procedural challenges under the Immigration and Nationalization Act's judicial review provision, rather than merely barring review of individual deportation orders, Congress could have used just such "expansive language"—for example, by explicitly barring review of "all causes" arising under the statute. *See* 498 U.S. at 494. That is precisely the type of all-encompassing language Congress has in fact employed in CERCLA's timing of review provision.

This reading of section 113(h) is supported by the legislative history. The Chairman of the Senate Judiciary Committee, which drafted section 113(h), explained:

> The timing of review section is intended to be comprehensive. It covers all law-suits, under any authority, concerning the actions that are performed by EPA. The section covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong.Rec. S14929 (daily ed. Oct. 3, 1986). Such an intent to prohibit review of "all lawsuits" under "any authority," and to cover "all issues," supports the conclusion that section 113(h) bars GE's challenge to CERCLA.

Nor can GE circumvent section 113(h) by framing its claim as a constitutional challenge rather than a statutory challenge. The Eleventh Circuit recently rejected the idea that there is somehow a difference under section 113(h) between a constitutional and a statutory claim:

> The language of section 113(h) does not distinguish between constitutional and statutory challenges; instead, it delays judicial review of "any" challenges to unfinished remedial action. . . . Because 'Congress did not add any language limiting the breadth of that word,' . . . "any" means "all." The use of the word "any" compels us to conclude that Congress meant to bar jurisdiction over constitutional challenges as well as statutory claims challenging the adequacy of a remedial plan.

Broward Gardens Tenants Assoc. v. EPA, 311 F.3d 1066, 1075 (11th Cir. 2002) (citation omitted); *see also Clinton County Comm'rs*, 116 F.3d at 1026 (finding that "the plain language of § 9613(h) precluded the exercise of jurisdiction over a challenge to an ongoing CERCLA removal or remedial action under *any* federal law" (emphasis in original)); *South Macomb*, 681 F. Supp. at 1249-50 ("Reading the language of § 9613(h) for its everyday meaning supports the notion that this subsection prohibits constitutional as well as statutory challenges until the time prescribed by the statute.").

Constitutional challenges to CERCLA brought pursuant to 28 U.S.C. § 1331 are not one of the five enumerated exceptions in section 113(h). In fact, other courts have ruled that pre-enforcement due process challenges are precluded. "Most courts have flatly concluded that because section 9613(h) bars pre-enforcement judicial review of 'any challenges to removal or remedial actions selected,' it also bars pre-enforcement judicial review of constitutional challenges to CERCLA itself." *Farmers Against Irresponsible Remediation (FAIR) v. EPA*, 165 F. Supp. 2d 253, 262 (N.D.N.Y. 2001) (section 113(h) bars pre-enforcement First Amendment challenge).

For example, in *Barmet Aluminum,* the plaintiff sought injunctive relief to prevent EPA from listing its site on a National Priority List and asserted that "because its challenge to CERCLA is constitutional, the general proscription against pre-enforcement review is inapplicable." 927 F.2d at 290. Just as GE argues here, the plaintiff asserted "that this statutory prohibition applies only to 'administrative decisions' and not 'constitutional challenge[s] to the entire CERCLA statutory scheme.'" *Id.* at 292. The Sixth Circuit rejected that construction of section 113(h):

> EPA argues that Congress passed 9613(h) to foreclose interpretations allowing pre-enforcement review of constitutional challenges. We agree. . . . Notably, the statutory language of section 9613(h) does not include any explicit provision for constitutional challenges.

Id. at 292-93; *see also Broward Gardens*, 311 F.3d at 1068 ("On appeal, plaintiffs do not assert that their claims fit within any of the [five] statutory exceptions to section 113(h), but instead contend that section 113(h) does not apply to begin with, because . . . section 113(h) does not apply to constitutional claims. We disagree."); *Aztec Minerals Corp. v. EPA*, 1999 WL 969270, at * 3 (10th Cir. 1999) (due process challenge barred because constitutional claim not within exceptions identified in section 113(h)); *South Macomb*, 681 F. Supp. at 1251 ("Congress intended that federal courts not have subject-matter jurisdiction to hear constitutional challenges to CERCLA at this stage of the proceedings under the Act.").[6]

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[6] The fact that section 113(h) explicitly permits jurisdiction under 28 U.S.C. § 1332, but makes no mention of jurisdiction under 28 U.S.C. § 1331, suggests an intentional omission by

III. Structure and Purpose of Section 113(h)

Of course, GE does not explicitly seek to overturn or enjoin EPA action or an EPA order, but instead simply seeks a declaratory judgment that sections 106, 107(c)(3) and 113(h) are unconstitutional. If it prevails, however, then naturally it would assert that ruling as a shield to invalidate or prevent section 106(a) orders by EPA. There is no doubt, then, that GE is, in effect, attempting to invalidate EPA orders that have been or may be issued to it. The vehicle for invalidating or preventing the enforcement of such orders is not determinative—rather, it is the end result sought that is critical, and here GE plainly seeks to invalidate or prevent enforcement of EPA section 106(a) orders.[7] GE's due process challenge, if successful, would have the effect of hindering (or outright preventing) EPA from enforcing orders and response actions and thereby from ensuring the complete remediation of the three sites detailed in the amended complaint (and arguably countless others as well). That result would be contrary to Congress's intent in crafting section 113(h), as it is "fairly discernable" from the structure and purpose of the statute that Congress intended a broad, pre-

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Congress so as to preclude pre-enforcement actions based on federal question jurisdiction.

[7] *Cf. United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000) ("Whichever way it is done, to ask the district court to decide whether the regulations are valid violates the statutory [review] requirements. As [we have stated], [w]here exclusive jurisdiction is mandated by a statute, a party cannot bypass the procedure by characterizing its position as a defense to an enforcement action. The exclusive jurisdiction of the courts of appeals cannot be evaded simply by labeling the proceeding as one other than a proceeding for judicial review.") (citations omitted).

enforcement constitutional challenge like GE's to be precluded.

The primary goal of section 113(h) is to prevent delays caused by legal challenges that could slow or interrupt the cleanup of hazardous waste sites. *See Barmet Aluminum*, 927 F.2d at 291 (CERCLA's "primary purpose is 'the prompt cleanup of hazardous waste sites.'") (quoting *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985)). As the Third Circuit has stated *en banc:*

> The purpose of [§ 9613(h)] is to ensure that there will be no delays associated with a legal challenge of the particular removal or remedial action selected under section [9604] or secured . . . under section [9606]. Without such a provision, responses to releases or threatened releases of hazardous substances could be unduly delayed, thereby exacerbating the threat of damage to human health or the environment.

Clinton County Comm'rs, 116 F.3d at 1024 (citing H.R. Rep. No. 99-253(V), at 25-26 (1985)). "In enacting section 113(h), 'Congress intended to prevent time-consuming litigation which might interfere with CERCLA's overall goal of effecting the prompt cleanup of hazardous waste sites.'" *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 674 (8th Cir. 1998) (quoting *United States v. City and County of Denver*, 100 F.3d 1509,1514 (10th Cir. 1996)); *see Barmet Aluminum*, 927 F.2d at 293 ("'Judicial review itself slows the process down.'") (quoting *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1999)). The D.C. Circuit has noted "that pre-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders." *OCAW*, 214 F.3d at 1382 (citing S. Rep. No. 11, 99th Congress 1, 58

(1985)). The goals underlying section 113(h), moreover, are equally at stake whether a pre-enforcement due process challenge seeks review of a specific EPA order or raises a broader attack on the statute:

> If the court were to consider the constitutionality of CERCLA, an injunction would have to issue to prevent any potentially unconstitutional actions from taking place. Such injunctions are precisely the type of impediment that the preenforcement review was meant to prohibit.

South Macomb, 681 F. Supp. at 1251.

The structure of CERCLA evidences congressional intent to preclude a constitutional challenge to the statute while removal or remedial action, or a section 106 order, is pending enforcement. "On its face, then, section 113(h) precludes contemporaneous challenges to CERCLA cleanups." *MESS*, 47 F.3d at 328. Allowing peripheral challenges to proceed while a response action is pending completion or enforcement would undermine the goal of rapid abatement of hazardous waste sites:

> Section 113(h) protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort. This result furthers the policy underlying CERCLA by allowing a quick response to serious hazards. Congress concluded that the need for such action was paramount, and that peripheral disputes . . . may not be brought while the cleanup is in process.

Id. at 329 (emphasis in original) (citation omitted). As the Seventh Circuit has observed, "[t]he obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur

prior to completion of the remedy." *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990).

One also cannot ignore the context of this litigation, and specifically GE's ongoing interaction with EPA over remediation at several locations, especially the contentious debate over the Hudson River cleanup. GE raises this broad challenge while three sites where EPA deems GE to be a PRP are currently in the process of remediation. EPA has sought "voluntary performance" by GE of a remedy that EPA selected and approved for clean-up work at the Fletcher Paint Works site in New Hampshire. Am. Compl. ¶ 46. GE also believes that "EPA will soon issue a unilateral order compelling GE to do the work." *Id.* EPA has served a section 106 order on GE for remediation of GE's former Hoboken, New Jersey, lamp factory, and has ordered GE to demolish the factory. *Id.* ¶ 34. Finally, GE alleges that "the EPA recently announced that it is now considering dredging projects" to remove PCBs from the Hudson River, a project GE contends will take a decade and cost hundreds of millions of dollars to complete, and as to which GE fears "EPA will invoke CERCLA's unilateral orders regime and require GE to implement a massive dredging remedy." *Id.* ¶¶ 41-42.[8] The fact that GE believes that EPA response actions or orders *are about to be imposed* only underscores the concern that GE brings this sweeping attack on CERCLA as

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[8] In fact, EPA filed its Record of Decision ("ROD") with a final remedial plan for the 40-mile stretch of the upper Hudson River on February 1, 2002. The plan calls for dredging 2.65 million cubic yards of contaminated sediment, in order to remove 75,000 tons of PCBs from the river. *See* ww.epa.gov/region02/news /2002/02005.htm.

an indirect means to challenge EPA's actual or imminent response actions and orders.

But as explained above, Congress's express purpose in enacting § 9613(h) "was to 'prevent private responsible parties from filing dilatory interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities.'" *United States v. Colorado*, 990 F.2d at 1576 (quoting H.R. Rep. No. 253(I), 99th Cong. 2d Sess. 266 (1985)). Indeed, premature judicial review "would force the EPA—against the wishes of Congress—to engage in 'piecemeal' litigation" and expend its limited resources inefficiently. *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1390 (5th Cir. 1989); *see also Barmet Aluminum*, 927 F.2d at 293 ("The bar of preenforcement review also serves other objectives, *e.g.*, avoiding piecemeal litigation and conserving EPA's limited resources."). Congress designed the statute to provide EPA with "the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard clean-up." *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3rd Cir. 1991). Permitting GE's due process challenge while EPA seeks to clean up the Hudson River and Fletcher Paint Works sites raises the possibility of interference with or delay of remediation plans, which is just what section 113(h) is designed to avoid.[9]

[9] The extensive discovery sought by GE to support its constitutional challenge to CERCLA is a prime example of such interference. GE has argued that its "due process claims . . . cannot be resolved in the absence of a fully developed record on the myriad factors posed by the constitutional inquiries at the heart of this case. A record is thus essential to ascertain the extent of the deprivation effected by the issuance of [administrative

GE's constitutional attack on CERCLA is thus premature. The sites reviewed in GE's amended complaint have yet to be fully remediated, and both the language and legislative history of section 113(h) support the conclusion that "federal courts are deprived of subject matter jurisdiction where remedial action has not been completed," and "where a remedial action is to be undertaken, no action may be brought." *Schalk*, 900 F.2d at 1096. "This provision is not intended to allow review of the selection of a response action prior to completion of the action." H.R. Rep. No. 253 (III), p. 3046. Congress made a deliberate and reasoned choice to require judicial review, even of constitutional challenges, to await the completion of remediation or EPA enforcement action. "EPA removal and remedial actions are designed to deal with situations involving grave and immediate danger to the public welfare. As we have noted, Congress apparently concluded that delays caused by citizen suit challenges posed a greater risk to the public welfare than the risk of EPA error in the selection of methods of remediation." *Clinton County Comm'rs*, 116 F.3d at 1025. As the Eleventh Circuit has emphasized:

> CERCLA's general objective is to protect the public health and environment against improper disposal of hazardous wastes. Section 113(h) furthers that objective by preventing EPA

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orders], the risk of error inherent in the [] regime, the cost of providing a meaningful hearing to [EPA order] recipients, and the Government's interest in failing to provide such a hearing." Pl. Opp. to Motion to Stay Discovery at 5. The breadth of the discovery sought by GE simply reinforces the congressional concern that pre-enforcement litigation challenging EPA actions would burden EPA's limited resources, redirecting time and resources away from hazardous waste remediation.

> remedial actions from being delayed by litigation. Given the litigiousness of our society, the virtually limitless ability of lawyers to construct constitutional challenges, and the protracted nature of litigation, it is not absurd for Congress to have assigned a higher priority to the prompt cleanup of a hazardous waste site than to the immediate adjudication of a claim challenging the remedial action.

Broward Gardens, 311 F.3d at 1076 (citations omitted).

Permitting GE's pre-enforcement challenge would encourage other PRPs saddled with EPA remediation orders to circumvent 113(h) by casting challenges in the same constitutional terms—if EPA's interpretation and application of CERCLA is unconstitutional here, it is arguably unconstitutional with respect to virtually any other PRP at any other hazardous waste site.[10] The purpose and structure of CERCLA and specifically section 113(h) offer strong evidence that Congress intended to postpone challenges like GE's constitutional claim until EPA attempts to enforce its removal or remedial action or section 106(a) order, or until remediation is complete.

IV. Meaningful Review

GE can obtain "meaningful review" of its due process challenge to CERCLA after EPA seeks enforcement of its orders or site remediation is complete; merely delaying the constitutional challenge will not undermine GE's ability to raise it. *Broward Gardens*, 311 F.3d at 1076 n.10 ("Nothing in our decision

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[10] GE would perhaps differentiate between emergency and non-emergency settings, but even the latter category encompasses a potentially vast number of sites and PRPs.

prevents these or any other plaintiffs from refiling this [constitutional challenge] or a similar complaint once the cleanup at the site is completed."). Several courts have held that pre-enforcement due process challenges (similar to GE's) to other environmental statutes—statutes modeled on CERCLA—can be reviewed meaningfully after EPA seeks enforcement. *See Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 570 (7th Cir. 1990) ("Hoffman will have an opportunity to present any constitutional arguments if the administrative law judge approves the proposed EPA penalty or if the EPA seeks judicial enforcement of the compliance order."); *Southern Pines Associates v. United States*, 912 F.2d 713, 716-17 (4th Cir. 1990) ("[W]e are persuaded that Congress meant to preclude judicial review of compliance orders under the [Clean Water Act] just as it meant to preclude pre-enforcement review under [the Clean Air Act] and CERCLA. . .. Southern Pines and VICO will have an opportunity to make their constitutional arguments at any enforcement proceeding before they are subjected to any injunction or penalty."); *see also Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 566 (10th Cir. 1995) ("Judicial review of every unenforced compliance order would undermine the EPA's regulatory authority."). So, too, GE can obtain judicial review of its due process challenge *before* any injunctions, fines, penalties, or punitive damages are imposed—and hence before there is any deprivation of a property interest. As the Supreme Court made clear in *Thunder Basin*, 510 U.S. at 215, although delayed, constitutional challenges to statutes can still receive meaningful review in federal court after administrative action. This holds true for GE's broad constitutional challenge to CERCLA as well.

V. Facial Constitutional Challenges

Seeking to bypass the clear prohibition on pre-enforcement judicial review under section 113(h), GE frames its suit as a *facial* constitutional challenge to provisions of CERCLA. The federal courts of appeals, however, have rejected attempts to circumvent judicial review limitations in other environmental statutes by raising, under 28 U.S.C. § 1331, constitutional challenges to the statute itself. *See, e.g., Nebraska v. United States*, 238 F.3d 946 (8th Cir. 2001); *Michigan Assoc. of Homes and Services for the Aging v. Shalala*, 127 F.3d 496 (6th Cir. 1997); *Missouri v. United States*, 109 F.3d 440 (8th Cir. 1997); *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996). Indeed, the D.C. Circuit has criticized clever plaintiffs who attempt "to short-circuit the administrative [review] process" in a statute by casting their complaint differently. *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002).

In *Virginia v. United States*, the Commonwealth of Virginia attempted to evade the Clean Air Act's judicial review provision by casting its complaint as a constitutional attack on the Act itself:

> The question before us in this case is whether Virginia, by framing its complaint as a constitutional challenge to the CAA, may circumvent direct review in the circuit court under CAA § 307(b)(1) and litigate in district court under 28 U.S.C. § 1331. . . . Virginia argues first that it 'does not seek a review of any final EPA action'; rather, it says, its 'constitutional challenge is directed to the statute itself.'

74 F.3d at 522 (citation omitted). Citing *Thunder Basin*, the Fourth Circuit held that Virginia could not

avoid review in the court of appeals by challenging the Act's constitutionality in district court under federal question jurisdiction: "There is simply no impediment to the adjudication of constitutional issues through petitions for direct review of final agency action in the circuit courts." *Id.* at 523. Likewise, the Eighth Circuit dismissed a similar attempt. "We cannot accept the argument that Missouri sought only to challenge the constitutionality of the statute completely apart from EPA action." *Missouri*, 109 F.3d at 441. That court reasoned:

> EPA has issued five formal deficiency findings to Missouri so far under the CAA. Missouri seeks to nullify the effects of these actions by having the sanctions they portend declared unconstitutional. While it is true that Missouri's complaint questions the constitutionality of the overall sanctions scheme of the CAA, this challenge is not separate and apart from EPA action.

Id. at 442.

GE's amended complaint details EPA's enforcement actions under CERCLA, including response actions and section 106 orders, with respect to alleged GE hazardous waste sites. *See* Am. Compl. ¶¶ 31-47. Although GE labels these references simply as "illustrations" of due process violations, it is difficult to separate GE's broader constitutional challenge from these specific EPA actions. A facial challenge to CERCLA, built on several "illustrations" of due process violations relating to EPA's remedial efforts at specific sites, poses the same or even a greater threat to EPA's environmental response efforts as does a challenge to a specific order. Simply raising a facial challenge to a statute should not be a means to avoid the statute's prohibition on pre-enforcement

review. In *Michigan Assoc. of Homes and Services for the Aging v. Shalala*, the Sixth Circuit concluded that a facial due process attack on Medicaid regulations was not an exception to a provision delaying judicial review:

> The Association and an amicus attempt to avoid [the judicial review limitation] by arguing that the statute's restrictive language applies only to individual claims for benefits or constitutional challenges that are intertwined with claims for benefits. This facial challenge, they argue, should be treated differently. We disagree. . . . The purposes of exhaustion . . . would be undermined by allowing the Association to avoid presenting its specific claims to the Secretary.

127 F.3d at 500.

The Supreme Court has similarly rejected the idea that distinctions should be drawn under statutory review provisions between substantive challenges to the merits of an agency action and procedural challenges that purport not to challenge a particular agency determination. *See Heckler v. Ringer*, 466 U.S. 602, 614 (1984) (simply because a claim can be construed as "procedural" does not make it cognizable in district court under 28 U.S.C. § 1331). In *Weinberger v. Salfi*, 422 U.S. 749, 760-761 (1975), the Court concluded that a constitutional challenge to the Social Security Act was a "claim arising under" the Act even though it was in one sense also a claim arising under the Constitution.

Thus, whether a statute precludes or delays judicial review of a particular claim should not turn on some artificial or clever distinction put forth by the party attempting to evade the statute's judicial review

limitation—whether constitutional versus statutory, facial versus as-applied, or procedural versus substantive. Section 113(h) draws no such distinctions—it applies to "any challenges." To import such a distinction into section 113(h) for facial constitutional challenges to CERCLA—or even for GE's self-described challenge to the "interpretation and application" of CERCLA—ignores the language and purpose of section 113(h)'s postponement of judicial review.

VI. *Reardon v. United States*

GE's reliance on the First Circuit's decision in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc), is unpersuasive. That case addressed a unique provision of CERCLA that allows EPA to place a lien on property, which was the subject of a challenge on due process grounds. The Court's decision is properly confined to that specific setting.

In *Reardon,* the EPA removed hazardous PCBs from the Reardons' property and then filed a notice of lien on the property pursuant to 42 U.S.C. 9607(*l*) as part of an effort to recover costs. *See* 947 F.2d at 1510. The Reardons then sought an injunction in district court, claiming that "EPA's imposition of the lien without a hearing violated the due process clause of the fifth amendment." *Id.* at 1511. The First Circuit concluded that section 113(h) did not bar review of a due process challenge to CERCLA itself.

The court construed section 113(h) narrowly, and observed that the challenge to the statute did not "fit into the literal language of § 9613(h)":

> That section refers to "challenges to removal or remedial action selected under section 9604 of this title." Under our reading, it divests federal

> courts of jurisdiction over challenges to EPA's *administration* of the statute—claims that EPA did not "*select*[]" the proper "removal or remedial action," in light of the standards and constraints established by the CERCLA statutes. The Reardons' due process claim is not a challenge to the way in which EPA is administering the statute; it does not concern the merits of any particular removal or remedial action. Rather, it is a challenge to the CERCLA statute itself—to a statutory scheme under which the government is authorized to file lien notices without any hearing on the validity of the lien.

Id. at 1514 (emphasis in original). The court emphasized that

> it is important to make clear that we are not holding that *all* constitutional challenges involving CERCLA fall outside the scope of § 9613(h). A constitutional challenge to EPA administration of the statute may be subject to § 9613(h)'s strictures. Such a claim may well be a "challenge[] to removal or remedial action selected under 9604 of this title," and may thus fall within § 9613(h)'s bar. We find only that a constitutional challenge to the CERCLA *statute* is not covered by § 9613(h).

Id. at 1515 (emphasis in original).

The statutory language of section 113(h) does not itself distinguish between two types of constitutional claims, one challenging the administration of CERCLA and one challenging the statute itself. Although the court in *Reardon* downplayed the fact that section 113(h) precludes judicial review of "any challenges" to removal or remedial action "in any action" (except

one of the five enumerated exceptions), the breadth of the statutory language cannot be ignored. The use by Congress of such expansive, all-encompassing language undermines the view that there is some distinction implicit within section 113(h) between a challenge to the administration of the statute and a challenge to the statute itself. Moreover, as is true of GE (which attacks the administration and interpretation of CERCLA by EPA), so, too, it is true that the Reardons were in effect challenging EPA's administration of CERCLA—*i.e.*, the choice by EPA to file a notice of lien on their property.

The focus in *Reardon* was on an interpretation of the phrase "removal or remedial action selected under section 9604" in section 113(h). The court found that a due process challenge to the lien provision of CERCLA did not fall within that language and thus the federal courts were not divested of jurisdiction to hear such a challenge. *See* 947 F.2d at 1515. Here, of course, GE's challenge is to the section 106 administrative order regime, which is an express part of the limitation on judicial review set out in section 113(h)—no federal court shall have jurisdiction "to review any order issued under section 9606(a) of this title [] in any action . . . ." Hence, *Reardon* is properly confined to the unique lien provision challenged there, and does not govern here.

Importantly, the panel decision in *Reardon* recognized that "the cleanup of the property is substantially complete, so litigation will cause no delay." *Reardon v. United States*, 922 F.2d 28, 1990 WL 209207, * 5 (1st Cir. 1990). Thus, the setting was such that the court could find that section 113(h) did not bar a pre-enforcement constitutional challenge to the lien provision without concern that abatement of the

hazardous waste site might be delayed. Of course, the sites EPA has ordered or may order GE to remediate are far from being cleaned up. Unlike *Reardon*, then, where the property was substantially abated, this case truly involves pre-enforcement judicial review.

Moreover, the actual harm to the Reardons—the lien on their property—was an immediate deprivation of a property interest that the court concluded could not be effectively challenged when EPA brings an enforcement action. The Reardons were immediately deprived of a property interest—the unencumbered use of their property—and that harm would continue until the lien was released. As the Supreme Court noted in *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991), subjecting property to a lien clouds its title and impairs the owner's ability to sell or mortgage the property. Indeed, the lien could tie up the property for years before the owner could get a hearing. "Since the government may take its own sweet time before suing, and since the removal or remedial action may itself take years to complete, the lien may be in place for a considerable time without an opportunity for a hearing." *Reardon*, 947 F.2d at 1519.

Here, in contrast, the alleged harm to GE will not occur until after EPA attempts to enforce its orders in court. The penalties, fines, or punitive damages GE fears under section 107 can only be imposed after EPA seeks to enforce its orders in court, and even then, the district court has discretion as to whether fines and penalties will be imposed, and if so how much. *See* 42 U.S.C. § 9607(c)(3). Hence, before any fines or punitive damages can be imposed, there is an opportunity for meaningful judicial review to consider challenges or defenses to EPA action. *See, e.g.*, *Barmet Aluminum*, 927 F.2d at 294-96; *J.V. Peters &*

Co. v. EPA, 767 F.2d 263, 266 (6th Cir. 1985) (PRPs "can suffer no deprivation until the adjudication of the section 107 litigation, however, and they will have the full opportunity to argue liability at that time").

GE's broad challenge to CERCLA is different from the challenge in *Reardon,* where the unique factual circumstances appear to have caused the court to impose a stricter standard for determining whether Congress intended to preclude judicial review. The court in *Reardon* construed 113(h) as completely precluding judicial review, rather than merely postponing it: "We read § 9613(h) in light of the Supreme Court's oft-repeated pronouncement that 'where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.'" *Id.* at 1514 (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988)). As explained in *Webster*, "[w]e require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." 486 U.S. at 603. Because a judgment in EPA's subsequent enforcement action "would render moot the Reardons' due-process-based request for injunctive relief against the filing of the lien, since it will decide whether or not the Reardons are liable under CERCLA," the court concluded that "the effect of section 113(h) is to preclude review altogether." 947 F.2d at 1515 n.1. Applying this "heightened showing" standard, the First Circuit "d[id] not believe that the statute expresses a clear congressional intent to preclude the type of constitutional claim the Reardons are making—a challenge to several statutory provisions which form part of CERCLA." *Id.* at 1515.

Such a "heightened showing" requirement should not apply here. Section 113(h) merely postpones review of GE's constitutional claims; it does not preclude review altogether. Moreover, the Supreme Court's decision in *Thunder Basin* came down three years after the ruling in *Reardon*. In *Thunder Basin*, which involved a constitutional challenge to the Mine Act, the Supreme Court explained that "[i]n cases of delayed judicial review of agency actions, we shall find that Congress has allocated initial review to an administrative body *where such intent is fairly discernable in the statutory scheme*." *Thunder Basin*, 510 U.S. at 207 (emphasis added).[11] This "fairly discernable" standard is less rigorous than the "heightened showing" standard followed in *Reardon* for statutes that entirely preclude review of constitutional claims. As explained at length above, it is "fairly discernable" from the language, purpose and history of section 113(h) that Congress intended to postpone review of the type of pre-enforcement constitutional challenge to CERCLA that GE raises here until EPA brings an enforcement action in district court.

Finally, subsequent to the decision in *Reardon*, several courts of appeals, citing *Thunder Basin*, have ruled that claims framed as constitutional challenges

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[11] The Supreme Court explained in *Thunder Basin* that "[b]ecause court of appeals review is available [under the Mine Act], this case does not implicate 'the strong presumption that Congress did not mean to prohibit all judicial review.'" 510 U.S. at 207 n.8 (citation omitted). Recently, the Supreme Court confirmed that it has repeatedly drawn a distinction between provisions that completely preclude review, and those that merely postpone it: the "strong presumption against preclusion of review is not implicated by [a] provision postponing review." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000).

to a statute do not circumvent statutory limitations on judicial review. *See, e.g.*, *Nebraska*, 238 F.3d at 948; *MAHSA*, 127 F.3d at 499; *Missouri*, 109 F.3d at 442; *Virginia*, 74 F.3d at 522. Moreover, at least three courts of appeals have ruled, contrary to *Reardon,* that constitutional challenges are within section 113(h)'s postponement of judicial review. *See Broward Gardens*, 311 F.3d at 1070; *Barmet Aluminum*, 927 F.2d at 293; *Aztec Minerals Corp. v. EPA*, 1999 WL 969270, 198 F.3d 257 (10th Cir. 1999). This weight of authority supports the conclusion that GE's pre-enforcement constitutional challenge to CERCLA is barred by section 113(h).

CONCLUSION

Section 113(h) of CERCLA delays judicial review of GE's broad, pre-enforcement due process challenge to the statute, which cannot be brought until EPA seeks enforcement or remediation is complete. Under the Supreme Court's ruling in *Thunder Basin*, the language of section 113(h), as well as its purpose, structure and legislative history, make it "fairly discernable" that Congress intended GE's constitutional challenge to be postponed. GE is not entirely precluded from raising its due process challenge; it can obtain meaningful review after EPA seeks enforcement of its response actions or remediation plan, including section 106(a) orders. Thus, the Court concludes that section 113(h) deprives this Court of subject matter jurisdiction over GE's challenge to CERCLA.

Accordingly, EPA's motion to dismiss is granted. A separate order will be issued on this date.

IT IS SO ORDERED

APPENDIX G

UNITED STATES CODE ANNOTATED

Title 42. The Public Health and Welfare
Chapter 103. Comprehensive Environmental Response, Compensation, and Liability
Subchapter I. Hazardous Substances Releases, Liability, Compensation

§ 9606. Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than

$25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was

arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of Title 28.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321(c)(2), 1318, 1319, and 1364(a) of Title 33, (2) sections 6927, 6928, 6934, and 6973 of

this title, (3) sections 300j-4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of Title 15.

APPENDIX H

UNITED STATES CODE ANNOTATED

Effective: January 11, 2002

Title 42. The Public Health and Welfare
Chapter 103. Comprehensive Environmental Response, Compensation, and Liability
Subchapter I. Hazardous Substances Releases, Liability, Compensation

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or

treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the

date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for

each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of Title 49), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or

threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33, 46, or 46 Appendix, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

* * *

APPENDIX I

UNITED STATES CODE ANNOTATED

Title 42. The Public Health and Welfare
Chapter 103. Comprehensive Environmental Response, Compensation, and Liability
Subchapter I. Hazardous Substances Release, Liability, Compensation

§ 9613. Civil proceedings

* * *

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with

respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on

liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under

section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

* * *

APPENDIX J

UNITED STATES CODE ANNOTATED

Title 28. Judiciary and Judicial Procedure
Part VI. Particular Proceedings
Chapter 163. Fines, Penalties and Forfeitures

§ 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

APPENDIX K

CODE OF FEDERAL REGULATIONS
Effective: January 12, 2009

Title 40. Protection of Environment
Chapter I. Environmental Protection Agency
Subchapter A. General
Part 19. Adjustment of Civil Monetary Penalties for Inflation

Table 1—of Section 19.4 Civil Monetary Penalty Inflation Adjustments					
U.S. code citation	Environmental statute	Statutory penalties as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009
* * *	* * *	* * *	* * *	* * *	* * *
42 U.S.C. 9604(c)(3)(C)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)	25,000	27,500	32,500	37,500
	42 U.S.C. 9606(b)(1)(CERCLA	25,000	27,500	32,500	37,500
	42 U.S.C. 9606(b)(1)(CERCLA	25,000	27,500	32,500	37,500
42 U.S.C. (9609,b)	CERCLA	25,000[illegible]75,000	27,500[illegible]82,500	32,500[illegible]97,500	37,500[illegible]107,500
42 U.S.C. (9609,c)	CERCLA	25,000[illegible]75,000	27,500[illegible]82,500	32,500[illegible]97,500	37,500[illegible]107,500
* * *	* * *	* * *	* * *	* * *	* * *

APPENDIX L

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

Civ. No. 1:00CV02855(JBD)

GENERAL ELECTRIC COMPANY,
Plaintiff,

v.

STEPHEN L. JOHNSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants,

PLAINTIFF GENERAL ELECTRIC COMPANY'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE ¶ 75

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* * *

75. EPA attorneys were trained to make the terms of UAOs "ugly, onerous, and tough" and to use UAOs to force settlement of large groups of PRPs by threatening to target some but not all of them and not saying whom: "Let's play Russian Roulette." Micinski Dep. at 117-18. EPA Rule 30(b)(6) deponent Cheryl Micinski testified that this training message is consistent with EPA practices in its dealings with PRPs. *Id.*; *see also id.* at 129-30 (EPA attorneys trained to "make settlement more attractive by making the alternatives what PRPs want least, very unpleasant" and to ask group of PRPs" "Do you feel lucky?"); *id.* at 143-44 (to same effect).

APPENDIX M

Excerpt of Deposition of Cheryle Micinski, EPA Rule 30(b)(6) deponent, taken on June 26th, 2007.

* * *

Q Now, the handwritten notes that this attorney took as part of superfund attorney training in talking about UAOs versus consent decrees states right under UAOs versus consent decrees, "To make it more attractive to PRPs to choose CD over UAO, make the UAO ugly, onerous and touch," correct?

A That's what it says.

Q And superfund attorneys, if you go down to the bottom of the page, "Superfund attorneys are provided in this training the message with respect to using UAOs to force settlements in a large group and are advised to tell them I will issue a UAO but I'm not going to tell your group to whom. Let's play Russian Roulette," correct?

. . .

THE WITNESS: That's what it says.

. . .

Q These instructions, again, are consistent with the message of the 1992 memorandum, January 1992 memorandum of how to use UAOs to induce PRPs to accept the model consent decree, correct?

A To the extent it talks about how many people you're going to issue the UAO to, yes.

Q And also with respect to the message to provide to PRPs that UAOs should be an unattractive alternative, correct?

A Yes.

Q And these messages or the message provided to these attorneys as part of superfund training on the use of UAOs in negotiation process is consistent with practices that EPA in fact employs in the negotiation process, correct?

. . .

THE WITNESS: In some instances. In some instances some of these messages might be incentives or disincentives that are offered as alternative. I can't speak to all cases.

* * *

Q And then there is the statement in a box, boxed out in the notes, "Makes settlement more attractive by making the alternative what the PRP wants least, very unpleasant," correct?

A I see that, yes.

Q Again, this message being conveyed in superfund attorney training is consistent with the recommendations in the January 1992 memorandum, correct?

. . .

THE WITNESS: To a certain extent, I guess so.

. . .

Q And there is also the statement higher up on the page, right above the demonstrates that settlement is preferable passage. The attorneys are provided in this training session the suggestion to say, quote, "Prepare to issue UAO but not to all and don't say who you'll issue to so you say, quote, do you feel lucky?" end quote. Do you see that?

A I see that.

* * *

Q The next statement there, three lines down in these notes, in superfund attorney training, attorneys are also provided the message that they can make the alternative to CD, whatever the PRPs wants the least?

A That's what it says, yes.

Q Again, this training of attorneys is consistent with the recommendations to make a UAO an unattractive alternative, correct?

. . .

THE WITNESS: To the extent it would be unattractive in the way, yes.

* * *

Q And once again, the message conveyed in EPA new attorney superfund attorney training, the advantage of a CD over a UAO is that the PRP gets good public relations and it also helps their relationship with EPA, correct?

A That's what it states in No. 6, yes.

APPENDIX N

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

Civ. No. 1:00CV02855(JBD)

GENERAL ELECTRIC COMPANY,
Plaintiff,

v.

STEPHEN L. JOHNSON, Administrator,
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, and the UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Defendants,

PLAINTIFF GENERAL ELECTRIC COMPANY'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE ¶ 150

* * *

150. It is very rare for PRPs to refuse to comply with UAOs. Mugdan Dep. at 197.

APPENDIX O

Excerpt of Deposition of Walter Mugdan, EPA Rule 30(b)(6) deponent, taken on July 1st, 2007.

* * *

Q EPA has been pretty successful, it is fair to say, is it not, in securing compliance with UAOs?

. . .

THE WITNESS: It depends on what you mean by pretty successful. I would judge the Agency to have been successful, yes.

. . .

Q One measure would be the percentage of folks who don't comply, right?

A That's correct.

Q That is a very small percentage, isn't it?

A Again, it depends on what you mean by very small. I judge it to be pretty small, yes.

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(14)

Supreme Court, U.S.
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No. 10-871

In the Supreme Court of the United States

GENERAL ELECTRIC COMPANY, PETITIONER

v.

LISA P. JACKSON, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9606(a), authorizes the Environmental Protection Agency (EPA) to issue administrative orders directing potentially responsible parties (PRPs) to clean up contaminated sites. Petitioner filed suit, alleging that Section 106(a) unconstitutionally deprives parties who are subjected to such orders of their property without due process of law. The questions presented are as follows:

1. Whether CERCLA, by affording PRPs opportunities for judicial review of a Section 106(a) order both before compliance (in the form of an EPA enforcement action) and after compliance (in the form of a reimbursement action), provides sufficient procedural safeguards to satisfy the Due Process Clause.

2. Whether a private market's reaction to the issuance of a Section 106(a) order that may affect the value of a company—apart from the costs of any cleanup or associated penalties—constitutes a deprivation of property.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-33a, 127a-139a) are reported at 610 F.3d 110 and 360 F.3d 188. The opinions of the district court (Pet. App. 36a-95a, 96a-126a, 140a-181a) are reported at 595 F. Supp. 2d 8, 362 F. Supp. 2d 327, and 257 F. Supp. 2d 8.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2010. A petition for rehearing was denied on September 30, 2010 (Pet. App. 34a-35a). The petition for a writ of certiorari was filed on December 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA "both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citation omitted). Congress imposed strict liability on several classes of parties, including some facility owners and operators as well as parties that arrange for the transport, treatment, or disposal of hazardous substances. 42 U.S.C. 9607(a). Parties that may fall into these categories are known as "potentially responsible parties" or "PRPs." *Burlington N. & Santa Fe Ry.* v. *United States*, 129 S. Ct. 1870, 1878 (2009).

Congress gave the Environmental Protection Agency (EPA) several options for cleaning up contaminated sites. See *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 160-161 (2004). EPA's preferred approach is to reach a negotiated settlement with PRPs for performance of the cleanup. 42 U.S.C. 9622; see Pet. App. 74a. EPA can also clean up a site itself, drawing from the government's "Superfund" to pay for the work, and then sue the responsible parties to recover its cleanup costs. 42 U.S.C. 9604(a), 9607(a)(4)(A). Alternatively, under the provision at issue in this case—CERCLA Section 106(a), 42 U.S.C. 9606(a)—EPA can issue an administrative order directing a PRP to investigate or clean up a contaminated site. Before issuing a Section 106(a) order, EPA must determine that there may be "an imminent and substantial endangerment to the public health or

welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. 9606(a).[1]

EPA typically gives potential recipients of Section 106(a) orders several opportunities to be heard before it issues a cleanup order. In identifying a party as a PRP, EPA formally notifies the party of EPA's views and allows that party to respond with any relevant information, including information disputing the party's liability. Pet. App. 4a, 74a. Before selecting a cleanup plan for a site, EPA invites, considers, and responds to comments from the PRP and the public. *Ibid.*; see 42 U.S.C. 9613(k)(2), 9617(b); 40 C.F.R. 300.415(n), 300.810-300.820. And before issuing a Section 106(a) order, EPA ordinarily tries to negotiate a resolution with the PRP. Pet. App. 74a. At each stage, EPA evaluates the information it receives and, if appropriate, may reconsider a party's CERCLA liability or the particular remedial plan at issue. *Ibid.*

After a Section 106(a) order is issued, CERCLA provides for two modes of judicial review: pre-cleanup enforcement proceedings and post-cleanup reimbursement proceedings. Section 113(h) of CERCLA provides, in pertinent part:

> No Federal court shall have jurisdiction under Federal law * * * to review any order issued under section 9606(a) of this title, in any action except one of the following:
>
> * * *

---

[1] Although the statute refers to the President, the President has delegated his Section 106 authority to EPA. See Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

> (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
>
> (3) An action for reimbursement under section 9606(b)(2) of this title.

42 U.S.C. 9613(h).

The enforcement action referred to in Section 9613(h)(2) applies to PRPs that choose not to comply with a Section 106(a) order. In order to compel compliance or to recover the costs of its own cleanup, EPA must file a civil action in federal court. 42 U.S.C. 9606(b)(1), 9607(c)(3). In defending against such an action, the PRP may contest its liability and the legality of the Section 106(a) order. See 42 U.S.C. 9613(h)(2). If the court concludes that the party is liable for the cleanup and that the order is otherwise lawful, it can impose fines and punitive damages, but only if it concludes that the PRP has "willfully violate[d]" or "fail[ed] or refuse[d] to comply" with the Section 106(a) order "without sufficient cause." 42 U.S.C. 9606(b)(1), 9607(c)(3). If it makes such a finding, the district court has discretion to choose the amount (if any) of any fine up to the statutory ceiling of $37,500 per day of noncompliance (42 U.S.C. 9606(b)(1)),[2] as well as the amount of punitive damages (if any) up to three times the cleanup costs (42 U.S.C. 9607(c)(3)).

Parties that comply with a Section 106(a) order may invoke the reimbursement action referred to in Section 9613(h)(3). 42 U.S.C. 9613(h)(3). After finishing the

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[2] The original maximum penalty was $25,000, 42 U.S.C. 9606(b)(1), but EPA is required to update the maximum penalty to reflect inflation. See 73 Fed. Reg. 75,340 (2008); 74 Fed. Reg. 626, 627 (2009).

cleanup, those parties can ask EPA to reimburse their reasonable cleanup costs, plus interest. 42 U.S.C. 9606(b)(2)(A). If EPA refuses, they may sue EPA in district court. 42 U.S.C. 9606(b)(2)(B); see, *e.g.*, *Chem-Nuclear Sys., Inc.* v. *Bush*, 292 F.3d 254 (D.C. Cir. 2002) (reviewing denial of reimbursement request). The PRP can recover its costs if it shows that it was not liable under CERCLA or that some part of EPA's selected cleanup was arbitrary, capricious, or otherwise not in accordance with law. 42 U.S.C. 9606(b)(2)(C) and (D).

2. a. Petitioner filed suit in federal district court, seeking a declaratory judgment that CERCLA Section 106, 42 U.S.C. 9606, violates the Fifth Amendment's Due Process Clause. Pet. App. 6a-7a. Petitioner alleged that Section 106 "'imposes a classic and unconstitutional Hobson's choice': because refusing to comply 'risk[s] severe punishment [*i.e.*, fines and treble damages],' [Section 106(a) order] recipients' only real option is to 'comply . . . before having any opportunity to be heard on the legality and rationality of the underlying order.'" *Id.* at 6a (quoting Amended Compl. ¶ 4). Petitioner further alleged that it "'has been and is aggrieved by CERCLA's fundamental constitutional deficiencies' because it has repeatedly received [Section 106(a) orders] and is likely to receive them in the future." *Id.* at 6a-7a (quoting Amended Compl. ¶ 7).

In March 2003, the district court dismissed petitioner's complaint for lack of jurisdiction. Pet. App. 140a-181a. Based in part on petitioner's representation that it was "not * * * challenging any specific order" (*id.* at 157a (quoting Amended Compl. ¶ 7)), the court found that petitioner's suit was barred by 42 U.S.C. 9613(h). Petitioner appealed on that threshold question and the court of appeals reversed, holding that

CERCLA "does not bar [petitioner]'s facial constitutional challenge to CERCLA." Pet. App. 127a-128a.

b. On remand, petitioner pursued two claims: the facial due process challenge described above, and a "pattern and practice" challenge to EPA's administration of Section 106. The district court rejected petitioner's facial due process claim, granting EPA summary judgment on the ground that CERCLA provides constitutionally sufficient process. The court explained, *inter alia*, that by refusing to comply with a Section 106(a) order, a PRP can put EPA to its proof. If EPA brings an enforcement action, the PRP can seek judicial review of the order. The court rejected petitioner's claim that the potential fines and treble damages are so severe that they effectively foreclose judicial review. In the alternative, the court held that the statute at least can be applied constitutionally in emergency situations. Pet. App. 115a-126a.

The district court initially allowed petitioner's "pattern and practice" claim to proceed. The court read the court of appeals' prior opinion to authorize not only a facial challenge but also "a broader systemic challenge" to EPA's administration of CERCLA, and it concluded that petitioner has standing to pursue such a challenge because EPA had issued Section 106(a) orders to petitioner in the past. Pet. App. 106a, 109a-111a. After two years of discovery into EPA practices, however, the district court granted EPA summary judgment on that claim. The court agreed with petitioner that certain "consequential injuries" that a PRP might suffer as a result of a Section 106(a) order—*e.g.*, decline in stock price, loss of brand value, and increased cost of financing—qualify as protected property interests. The court concluded, however, that the significance of those inter-

ests, when considered together with the government's interests in enforcing CERCLA and the "very low" risk of error in Section 106 procedures, was insufficient to render EPA's practices unconstitutional. *Id.* at 36a-95a.

3. The court of appeals affirmed. Pet. App. 1a-33a.

a. The court of appeals first addressed petitioner's facial challenge that CERCLA does not provide adequate pre-deprivation judicial review for the out-of-pocket costs of complying with a Section 106(a) order (*i.e.*, the cleanup costs incurred by the PRP) because the threat of penalties leaves it no choice but to comply. Pet. App. 10a. The court acknowledged that, under *Ex parte Young*, 209 U.S. 123 (1908), a statutory scheme violates due process if "the penalties for disobedience are by fines so enormous . . . as to intimidate the [affected party] from resorting to the courts to test the validity of the legislation." Pet. App. 11a (quoting *Young*, 209 U.S. at 147). The court noted, however, that "statutes imposing fines—even 'enormous' fines—on non-complying parties may satisfy due process if such fines are subject to a 'good faith' or 'reasonable ground[s]' defense" or are "subject to judicial discretion." *Ibid.* (citations omitted).

The court of appeals held that CERCLA provides such safeguards. The court explained that CERCLA offers non-complying PRPs several levels of protection in that fines and treble damages will be imposed only if a federal court finds (1) that the Section 106(a) order was proper; (2) that the PRP has "willfully" violated the order or has failed to comply "without sufficient cause"; and (3) that, in the court's discretion, penalties are appropriate. Pet. App. 11a. The court concluded that, contrary to petitioner's assertion, "PRPs face no Hobson's choice" between incurring the costs of compliance and

risking penalties for noncompliance. *Id.* at 12a-13a. The court also noted that its rejection of petitioner's facial challenge to CERCLA Section 106 was consistent with the decisions of the three other courts of appeals that have considered the issue. *Ibid.* (citations omitted).

b. The court of appeals next addressed petitioner's contention that issuance of a Section 106(a) order deprives petitioner of a protected property interest by creating a "contingent liability" that can be expected to depress stock price, harm brand value, and increase the cost of financing. Pet. App. 13a. The court noted that petitioner's alleged injuries are "consequential," *i.e.*, that they derive not from EPA "extinguish[ing] or modify[ing] a right recognized by state law," but rather from "independent market reactions" to the issuance of a Section 106(a) order. *Id.* at 14a (citation omitted).

The court of appeals rejected petitioner's suggestion that, under *Connecticut* v. *Doehr*, 501 U.S. 1 (1991), due process protections are triggered by the threat of consequential injuries of the sort claimed here. Pet. App. 15a-16a. The court explained that, although *Doehr* "stands for the proposition that consequential injuries can affect the significance of the private interests at stake" in a due process challenge, *Doehr* does not imply that "consequential injuries, standing alone, merit due process protection." *Id.* at 16a. The court further concluded that *Paul* v. *Davis*, 424 U.S. 693 (1976), foreclosed any claim to due process protection based on the prospect of reputational damage. Pet. App. 16a-20a. Under *Paul* and its progeny, the court explained, plaintiffs who allege "stigma plus" due process claims must show not only that they have suffered reputational harm, but also that the government has "deprived them of some benefit

to which they have a legal right." *Id.* at 17a. The court of appeals further explained that a "stigma plus" claim based on alleged damage to property (as opposed to liberty) interests requires plaintiffs to demonstrate that the reputational damage "*completely* destroys the value of their property." *Id.* at 18a. Because petitioner had failed to show such an impact, the court concluded, any "stigma plus" claim failed. *Id.* at 20a.[3]

c. After determining that the district court had jurisdiction to entertain petitioner's "pattern and practice" challenge (Pet. App. 24a-30a), the court of appeals rejected that claim on the merits (*id.* at 30a-32a). The court relied on petitioner's concession that, if the consequential harms it alleged (stock price, brand value, and credit rating) are insufficient to trigger due process protection, then its "pattern and practice" claim necessarily fails. *Id.* at 30-31a.

The court of appeals agreed with the district court that the "pattern and practice" claim "adds little to [petitioner's] facial *Ex parte Young* challenge: regardless of EPA's policies, * * * a *judge* ultimately decides what, if any, penalty to impose." Pet. App. 32a (internal quotation marks and citation omitted). The court of appeals also noted the district court's finding that "instances of noncompliance are sufficiently numerous to suggest that PRPs are not, in fact, forced to comply." *Ibid.* The court added that, in light of the extensive procedures that EPA follows before issuing a Section 106(a) order,

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[3] The court of appeals also found that petitioner had waived its belated argument that the issuance of a Section 106(a) order "triggers due process protections because it follows a factfinding, adjudicatory proceeding." Pet. App. 20a. It then rejected that argument on the merits. *Id.* at 21a-23a.

"recipients may be complying in large numbers not because they feel coerced, but because they believe that [the orders] are generally accurate and would withstand judicial review." *Ibid.*[4]

ARGUMENT

Petitioner contends that (1) EPA's issuance of a Section 106(a) order, by requiring PRPs to expend funds on cleanup without an adequate opportunity for pre-compliance judicial review, violates regulated entities' rights under the Due Process Clause; and (2) consequential harms to stock price, brand value, and credit rating that might result from issuance of a Section 106(a) order constitute deprivations of a protected property interest. The court of appeals correctly rejected both those arguments, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Consistent with the rulings of every other court of appeals that has considered the question, the D.C. Circuit correctly held that EPA's issuance of a Section 106(a) order does not deprive the recipient of property without due process of law.

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[4] Petitioner does not appear to press any separate "pattern or practice" claim in its petition for certiorari. In the government's view, the court of appeals lacked jurisdiction to consider that claim. To the extent that petitioner's claim seeks pre-enforcement judicial review of one or more specific Section 106(a) orders, it is barred by 42 U.S.C. 9613(h). To the extent that petitioner seeks review of EPA's general enforcement practices, divorced from any particular Section 106(a) order, its challenge is inconsistent with the Article III requirement that a plaintiff seek relief from "specifically identifiable Government violations of law." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (citation omitted); see *City of Rialto* v. *West Coast Loading Corp.*, 581 F.3d 865, 871 (9th Cir. 2009).

a. The first step in the due process inquiry is to determine whether the plaintiff has been deprived of a protected property interest. If such a deprivation has occurred, the second step requires balancing the significance of the protected interest, the government's competing interest, and the risk of erroneous deprivation relative to the value of any additional safeguards. Pet. App. 9a-10a (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)). To succeed on its facial challenge, petitioner must demonstrate "that no set of circumstances exists under which [CERCLA Section 106(a)] would be valid," or that its provisions lack any "plainly legitimate sweep." *Id.* at 9a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) and *Washington* v. *Glucksberg*, 521 U.S. 702, 740 n.7 (1997)).

Although a PRP has a protected property interest in money spent to perform remediation required by a Section 106(a) order or to pay any court-imposed penalties, CERCLA provides PRPs with ample procedural safeguards against an unlawful deprivation of such funds. First, even before a Section 106(a) order is issued, EPA provides notice to a PRP, which may submit information disputing liability or otherwise contesting the issuance or scope of a cleanup order at multiple stages of the process. See p. 3, *supra*.

Second, if a PRP chooses not to comply with any Section 106(a) order that is issued after that process, it will not have paid any cleanup costs. If EPA then seeks to compel compliance with the order, it must bring a civil enforcement action in federal district court. 42 U.S.C. 9613(h)(2); see pp. 3-4, *supra*. In such an action, the PRP is entitled to assert as a defense that it is not liable under CERCLA; that the required cleanup is arbitrary

or capricious; or that issuance of the Section 106(a) order violated its due process rights. 42 U.S.C. 9606(b)(2)(C) and (D); see *United States* v. *Capital Tax Corp.*, No. 04-C-4138, 2007 WL 488084, at *3-*4 (N.D. Ill. Feb. 8, 2007) (considering due process counterclaim). CERCLA therefore entitles the recipient of a Section 106(a) order to judicial review *before* the PRP can be forced to incur any cleanup costs.

Third, a PRP can comply with a Section 106(a) order and then seek reimbursement of the cleanup costs it has incurred (plus interest). See pp. 4-5, *supra*; 42 U.S.C. 9606(b)(2), 9613(h)(3). Although not necessary to satisfy due process in light of the other aforementioned protections, the reimbursement provision "trims the horns" of any dilemma a party might believe it faces as a result of an allegedly improper Section 106(a) order. See *Employers Ins. of Wausau* v. *Browner*, 52 F.3d 656, 661-662 (7th Cir. 1995); see also *City of Rialto* v. *West Coast Loading Corp.*, 581 F.3d 865, 871 (9th Cir. 2009) (PRP "can obtain judicial review of the validity of a [Section 106(a) order] either *before* or *after* it has complied with the order.").

b. In disputing the constitutional sufficiency of those procedural protections, petitioner raises essentially one argument: that the threat of fines and punitive damages for seeking pre-compliance judicial review makes that option inadequate under *Ex parte Young*, 209 U.S. 123 (1908). Pet. 19-26. The court of appeals correctly rejected that contention.

In *Young*, the Court considered the constitutionality of state laws that imposed mandatory penalties for charging certain railroad freight rates. 209 U.S. at 127-128. A company could obtain review of those laws

only by disobeying them and risking substantial automatic penalties if it did not prevail. *Id.* at 145-146. The Court held the laws unconstitutional, reasoning that the burden of automatic penalties was so severe that the laws effectively "preclude[d] a resort to the court * * * for the purpose of testing [their] validity." *Id.* at 146-148.

Since *Young*, the Court has clarified that statutes imposing fines for noncompliance with a government order are constitutional as long as imposition of penalties is not automatic but instead is subject to a "good faith" defense or judicial discretion or plenary review. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 218 (1994) (finding no constitutional violation where penalty assessment became payable only after full review by an administrative body and federal court of appeals);[5] *Reisman* v. *Caplin*, 375 U.S. 440, 446-47 (1964) (statute creating penalties for failure to respond to summons did not violate *Young* where penalty provision "d[id] not apply where the witness appears and interposes good faith challenges to the summons"); *Yakus* v. *United*

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[5] Contrary to petitioner's suggestion (Pet. 22-23), there is no inconsistency between the ruling below and this Court's decision in *Thunder Basin*. In *Thunder Basin*, the Court held that the Mine Safety and Health Act precluded a pre-enforcement district court challenge to an agency directive. 510 U.S. at 207-216. The Court then declined to consider the plaintiff's claim that a lack of pre-enforcement judicial review would violate its due process rights. In relevant part, the Court explained that, notwithstanding potentially "onerous" penalties for noncompliance, the relevant statutory scheme did not create the "constitutionally intolerable" choice presented in *Young* because "the Secretary's penalty assessments become final and payable only after full review by both the Commission and the appropriate court of appeals." *Id.* at 218.

States, 321 U.S. 414, 437-438 (1944) (no denial of due process where statute provided an opportunity to test the validity of regulations without necessarily incurring penalties).

Contrary to petitioner's assertion (Pet. 3; see Pet. 20), CERCLA does not "impose[] treble damages plus penalties" for noncompliance with a Section 106(a) order. Only a federal court (exercising its discretion) can impose fines or punitive damages for such noncompliance. The court may take that step, moreover, only after the noncomplying party has been given the opportunity to argue that it was not a liable party; that the order was invalid; that it did not "willfully" violate the Section 106(a) order; or that it had "sufficient cause" to not comply pending judicial review. 42 U.S.C. 9606(b)(1), 9607(c)(3). Those protections against penalties are not purely "theoretical[]." Pet. 20. Even when they choose to levy penalties, courts often award far less than the maximum penalties available. See, *e.g.*, *United States* v. *Capital Tax Corp.*, No. 04-C-4138, 2007 WL 2225900, at *13 (N.D. Ill. Aug. 1, 2007) (awarding penalty of $750/day for noncompliance with Section 106 order and declining to award punitive damages), vacated on other grounds, 545 F.3d 525 (7th Cir. 2008); *United States* v. *Barkman*, No. CIV. A. 96-6395, 1998 WL 962018, at *18 (E.D. Pa. Dec. 17, 1998) (penalty of $100/day imposed for violation of Section 106 order).[6]

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[6] Petitioner argues (Pet. 21, 25) that, because EPA is not required to bring an enforcement action immediately, the agency can allow potential fines to accrue subject only to a five-year statute of limitations. See 28 U.S.C. 2462. In determining whether to assess CERCLA penalties, however, and in setting the amount of any penalty it chooses to impose, a court may take into account any undue delay by EPA in pursuing an

Petitioner does not contend that the court of appeals' rejection of its *Young*-based challenge conflicts with the decision of any other circuit. As the court below observed (Pet. App. 12a-13a), every court of appeals that has addressed a similar due process challenge has upheld the constitutionality of CERCLA Section 106's enforcement regime. See *Employers Ins.*, 52 F.3d at 664; *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 388-391 (8th Cir. 1987); *Wagner Seed Co.* v. *Daggett*, 800 F.2d 310, 315-317 (2d Cir. 1986); see also *City of Rialto*, 581 F.3d at 872 (endorsing Seventh Circuit's holding in *Employers Ins.*).[7]

2. The court of appeals also correctly rejected petitioner's contention that collateral market reactions to a

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enforcement action. EPA's discretion in that regard thus does not render CERCLA inconsistent with *Young*. In any event, the district court found that petitioner had not offered any evidence to suggest that EPA in fact delays enforcement proceedings. Pet. App. 79a.

[7] See also *Raytheon Aircraft Co.* v. *United States*, 501 F. Supp. 2d 1323, 1331-1334 (D. Kan. 2007) (rejecting facial and as-applied *Young* challenges to Section 106 scheme); *Capital Tax*, 2007 WL 488084, at *4-*5 ("sufficient cause" defense and judicial discretion over penalties "avoids the *Ex parte Young* problem" and renders Section 106 scheme constitutional). Other courts (including this Court) have upheld similar enforcement schemes under other statutes. See, *e.g.*, *Thunder Basin*, 510 U.S. at 216 (finding no *Young* violation under Mine Safety and Health Act where penalties for violating order were payable only after administrative and judicial review); *Laguna Gatuna* v. *Browner*, 58 F.3d 564, 566 (10th Cir. 1995) (rejecting argument that precluding pre-enforcement review of Clean Water Act (CWA) compliance order was "constitutionally intolerable," even though recipient may have "to violate an EPA order and risk civil * * * penalties to obtain judicial review"); *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1426 (6th Cir. 1994) (similarly rejecting due process challenge to CWA enforcement provisions).

Section 106(a) order—in the form of negative effects on stock price, brand value, or credit rating—deprive a PRP of a protected property interest.

a. To have a protected property interest, a person must have "a legitimate claim of entitlement" to an interest created by "an independent source such as state law." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972). And to implicate the Due Process Clause, the deprivation of such a property interest must be caused by state action, not by purely private choices. See *Blum* v. *Yaretsky*, 457 U.S. 991, 1002-1005 (1982); *Mathews*, 424 U.S. at 332. As the court of appeals noted, petitioner points to no "independent source such as state law" for its purported property interest in stock price, brand value, or credit rating. Pet. App. 14a (citing *Roth*, 408 U.S. at 577). Petitioner also does not dispute that the type of harms it asserts are "consequential," *i.e.*, the result of a private market's reaction rather than the direct result of any governmental deprivation of a protected property interest. *Ibid.*

Petitioner instead contends that the court of appeals "artificially distinguish[ed] between the physical attributes of property" and less tangible interests such as credit rating or brand value. Pet. 28. That argument reflects a misunderstanding of the court of appeals' reasoning. If the government directly infringed on an intangible but protected property interest—by, for example, requiring petitioner to sell company stock for less than the market would bear—a different constitutional question would be presented. Under the CERCLA enforcement regime, however, any effect that a Section 106(a) order may have on a company's stock price or credit rating results from the independent choices of

persons outside EPA. Under petitioner's view, the Food and Drug Administration's unilateral issuance of a warning letter to a drug company (see *Matrixx Initiatives, Inc.* v. *Siracusano*, No. 09-1156 (Mar. 22, 2011), slip op. 14) or a public investigation by the Securities and Exchange Commission—either of which could cause a drop in a company's stock price or credit rating—would constitute a deprivation of a protected property interest. Acceptance of that theory would mark a dramatic departure from established regulatory practice.

b. Contrary to petitioner's contention (Pet. 12-15), the court of appeals' ruling does not conflict with this Court's decision in *Connecticut* v. *Doehr*, 501 U.S. 1 (1991). Petitioner reads *Doehr* to stand for the sweeping proposition that consequential harms to property interests trigger due process protection "even if imposed by 'the market' in response to the government action." Pet. 14. But the word "market" does not even appear in the *Doehr* opinion. Rather, *Doehr* stands for the much more limited proposition that consequential harms are relevant to the significance of the private interests at stake in the second step of the due process inquiry, *i.e.*, in determining what procedures are adequate once it has been determined that a deprivation of property has occurred. *Doehr* does not suggest that consequential harms *themselves* can constitute protected property interests in the first step of the due process analysis. As the court of appeals explained (Pet. App. 15a-16a), the Court in *Doehr* addressed consequential harms not in its threshold determination that the real property attachment at issue in that case triggered due process protection, but only in the subsequent portion of its opinion

determining the nature of the procedures required. See 501 U.S. at 11-12.

Doehr is one in a line of decisions in which this Court has considered "what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure." 501 U.S. at 9. The statute at issue in *Doehr* authorized prejudgment attachment of real estate, and each of the prior cases cited by the Court also involved a prejudgment attachment, garnishment, or other seizure of property. *Id.* at 4, 9-10. The existence of a property deprivation was not seriously at issue in *Doehr* or in any of the cases cited therein. Rather, as the court of appeals observed (Pet. App. 15a-16a), the question was whether the interests affected by that deprivation were significant enough to require additional pre-deprivation process (and, if so, how much). See *Mathews*, 424 U.S. at 335 (identifying "the private interest that will be affected" as the first factor to consider in determining what process is due).

Read in full context, the passage from *Doehr* relied on by petitioner demonstrates that the Court considered the consequential harms only in applying the second step of the *Mathews* inquiry (*i.e.*, balancing the relevant factors to determine the adequacy of the procedures that the State had afforded), not in determining whether a deprivation of a protected property interest had occurred in the first place:

> We now consider the *Mathews* factors in determining the adequacy of the procedures before us. * * *
>
> We agree with the Court of Appeals that the property interests that attachment affects are significant.

> For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default.

Doehr, 501 U.S. at 11.

The Court acknowledged that an attachment, lien, or encumbrance could cause impairments requiring due process protections:

> [T]he State correctly points out that these effects do not amount to a complete, physical, or permanent deprivation of real property; their impact is less than the perhaps temporary total deprivation of household goods or wages. * * * But the Court has never held that only such extreme deprivations trigger due process concern. * * * [E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.

Doehr, 501 U.S. at 12 (citations omitted). But the recognition that even "temporary or partial" impairments caused by "attachments, liens, and similar encumbrances" have the potential to trigger due process protections is neither surprising nor instructive here. *Ibid.* As the court of appeals noted, attachments and liens "pluck a stick from the property owner's bundle and hold it as surety," thereby depriving an owner of some portion of its property rights. Pet. App. 16a (citation omitted). That limited holding does not support petitioner's contention that the consequential harms identified by the *Doehr* Court (a cloud on title, restraints on alienability,

a damaged credit rating) are deprivations *in themselves*, even when there has been no preceding attachment of property.

Petitioner attempts to analogize this case to *Doehr* by characterizing the market reactions that a Section 106(a) order may elicit as "the same sorts of consequential encumbrances" (Pet. 13) as were at issue in that case. The term "encumbrance," however, is defined as a "claim or liability that is *attached to* property or some other right and that may lessen its value, such as a lien or mortgage; *any property right that is not an ownership interest*." *Black's Law Dictionary* (9th ed. 2009) (emphasis added). Although a Section 106(a) order might affect the market's view of a PRP, such an order does not modify any recognized property right. See Pet. App. 14a. Nor do the consequential effects that petitioner foresees constitute "encumbrances." While a reduction in credit rating or a drop in brand value may create practical problems for a PRP, such private responses to an EPA order do not place any legal restraint on the PRP's property or operations.[8]

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[8] For essentially the same reasons, a Section 106(a) order is not meaningfully "analogous" to (Pet. 13), or the "functional equivalent" of (Pet. 18), government imposition of a lien or attachment. See *URI Student Senate* v. *Town of Narragansett*, 707 F. Supp. 2d 282, 300 (D.R.I. 2010) (holding that the loss of rent caused by the difficulty of renting property with a sticker indicating "unruly gathering" "is not the type of temporary injury to real property that has been held to violate due process"), aff'd, No. 10-1209, 2011 WL 17610 (1st Cir. 2011). Citing *Doehr*, the district court in *URI Student Senate* concluded that any loss of rent was "not due to any legal effect the sticker has, but the practical reality that potential renters find houses with stickers less desirable. Unlike liens or attachments, which create interests that might trump those of future tenants, buyers, or creditors, the sticker does not erect

c. Petitioner is likewise wrong in arguing (Pet. 15-16) that the decision below conflicts with the First Circuit's ruling in *Reardon* v. *United States*, 947 F.2d 1509 (1991) (en banc). The court in *Reardon* considered Section 107(*l*) of CERCLA, 42 U.S.C. 9607(*l*), which provides that "[a]ll costs and damages for which a person is liable to the United States" under Section 107(a) "shall constitute a lien in favor of the United States" on real property owned by that person and affected by a clean-up. Applying *Doehr*, the First Circuit concluded that the lien on real property created by Section 107 constitutes a deprivation of a property interest rendered "significant" by its consequential effects. *Reardon*, 947 F.2d at 1518-1519. The court in *Reardon* did not suggest, however, that the consequential effects of a lien constitute Fifth Amendment deprivations of property in and of themselves. The critical absence of a lien or similar encumbrance materially distinguishes this case from *Reardon* (and *Doehr*).

Petitioner also asserts (Pet. 16-17) that there is "tension" between the decision below and decisions of the

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any legal barriers to renting, selling, or mortgaging a residence. The 'orange sticker' provision is therefore not analogous to those encumbrances." *Ibid.*; see *URI Student Senate*, 2011 WL 17610, at *6 (court of appeals concludes that lost rent allegedly attributable to sticker was not a viable "plus factor" for "stigma plus" due process claim). See also, *e.g.*, *Industrial Safety Equip. Ass'n* v. *EPA*, 837 F.2d 1115, 1121-1122 (D.C. Cir. 1988) (government report's potential "indirect effect" on competition was "hardly * * * a constitutional deprivation of property deserving fifth amendment protection"); *Nuclear Transp. & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1354 (6th Cir. 1989) (any "commercial detriment" caused by change in regulatory policy was "an indirect injury resulting from government action," not a cognizable property deprivation).

Second and Third Circuits. Petitioner's reliance on those decisions is misplaced.

In *Ford Motor Credit Co.* v. *NYC Police Department*, 503 F.3d 186 (2007), the Second Circuit considered the extent of a lienholder's right to participate in a civil forfeiture process whereby certain motor vehicles could be seized by the city. *Id.* at 188. The Second Circuit held that the lienholder was entitled to greater participation rights than the relevant city laws afforded because "a security interest is indisputably a property interest protected by the Fourteenth Amendment." *Id.* at 191. A Section 106(a) order, by contrast, neither creates nor impairs any security interest. Contrary to petitioner's suggestion (Pet. 16), the Second Circuit did not read *Doehr* to hold that consequential injuries alone constitute a deprivation of a property interest. Although the Second Circuit cited *Doehr*, it did so only in passing, as "cf." support for rejecting the city's argument that a delay in a forfeiture proceeding did not deprive Ford of its secured property interest in the present value of a seized vehicle. *Ford*, 503 F.3d at 192.

In *Burns* v. *Pennsylvania Department of Correction*, 544 F.3d 279 (2008), the Third Circuit cited *Doehr* only for the proposition that even a temporary impairment of property rights potentially triggers due process protection. *Id.* at 281 n.2. That proposition is not at issue here. Moreover, the Third Circuit's holding that an unexecuted assessment on an inmate account constituted a deprivation of property was dependent on its conclusion that the assessment gave the Department of Corrections "something similar to a money judgment" in that the assessment rendered the account subject to seizure at any time. *Id.* at 288-290 & n.8. By contrast,

EPA cannot unilaterally compel compliance with a Section 106(a) order or obtain penalties for noncompliance; it must go to federal court to achieve those results.[9]

In any event, none of the cases cited by petitioner involved a challenge premised on the consequential harms that might result from issuance of a Section 106(a) order. The decision below is apparently the first to address petitioner's theory in the context of CERCLA Section 106, making this Court's review particularly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2011

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[9] The state cases that petitioner describes as "in tension with" the decision below (Pet. 18-19) are similarly inapt. Those cases all involve mechanics' lien laws, which grant a lien to secure payment for labor or materials supplied to improve or maintain property. See *Gem Plumbing & Heating Co.* v. *Rossi*, 867 A.2d 796 (R.I. 2005) (mechanics' lien law did not violate due process); *Connolly Dev., Inc.* v. *Superior Court of Merced County*, 553 P.2d 637 (Cal. 1976) (same); *Barry Props., Inc.* v. *Fick Bros. Roofing Co.*, 353 A.2d 222 (Md. 1976) (mechanics' lien law unconstitutional in part).

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. The Government's brief in opposition ("Opp.") fails to acknowledge the extent to which the statutory scheme allowing the U.S. Environmental Protection Agency ("EPA") to impose Unilateral Administrative Orders ("UAOs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") is an aberration in administrative law. This scheme produces irresistible financial pressure for Potentially Responsible Parties ("PRPs") to comply with UAOs, no matter how baseless, without affording the timely hearing before an impartial

decision-maker that is the traditional hallmark of due process. As the amicus brief of the Chamber of Commerce makes clear after detailed examination of numerous other regulatory regimes, "EPA's UAO scheme represents an extreme outlier." Chamber of Commerce Amicus Br. 22; *see also* Pet. 23-24 & n.11 (discussing additional statutory schemes). The decision below warrants review for holding that due process protections do not even apply to this extraordinary scheme of "sentence first, trial afterwards."

The fully developed factual record in this case—which the opposition conspicuously ignores—reveals the magnitude of the UAO scheme's coercive effect. EPA issues "approximately six UAOs to nineteen PRPs every *month*," Pet. App. 82a, and thus has ordered private firms to pay $5.5 billion over the last quarter century. For the more than 5,400 PRPs caught in the grasp of the UAO scheme, Pet. App. 82a, CERCLA creates an inescapable pincer. Because the PRP cannot obtain access to courts to protect its rights, 42 U.S.C. § 9613(h), the PRP must either comply with the UAO and hope to obtain reimbursement years later when a clean-up is finally complete, or refuse to comply, suffer an immediate and unavoidable loss of market value and increase in financing costs, and wait until EPA takes the PRP to court, Pet. App. 4a-5a. Given the chance to impose such coercive pressure, EPA prefers to issue UAOs as a matter of course rather than employ other provisions of CERCLA that would provide PRPs with meaningful predeprivation judicial review. Pet. 7-8 (citing EPA, OSWER Directive No. 9833.0-1A, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions 3 (Mar. 7, 1990)). The record shows that the result is near-total compliance, as

only a handful of PRPs has ever risked actually challenging a UAO. Pet. App. 202a. As the Chamber of Commerce amicus brief correctly describes it, this is "regulation-by-sledgehammer." Chamber of Commerce Amicus Br. 13.

2. The extraordinarily coercive nature of the UAO scheme renders baseless the Government's concern that petitioner's arguments would throw into doubt such routine administrative actions as an FDA warning letter or an SEC investigation. Opp. 17. Such actions bear no resemblance to a UAO. The announcement of an SEC investigation, for example, is merely the opening move in a process in which any ultimate charge is immediately reviewable in federal court. Similarly, an FDA warning letter "is informal and advisory" and merely "communicates the agency's position on a matter, but it does not commit FDA to taking enforcement action." FDA, Regulatory Procedures Manual 4-1-1. In contrast, as the district court concluded, a UAO is a condensed prosecution and adjudication that finds facts and states legal conclusions while simultaneously making a PRP immediately legally responsible for a violation, requiring fulfillment of specific responsibilities and imposing specific penalties that commence on the UAO's effective date. Pet. 5 (quoting *Gen. Elec. v. Johnson*, No. Civ.A.00-2855, 2006 WL 2616187 at *15 n.5 (D.D.C. Sept. 12, 2006)).

Nor is the UAO statutory regime in any way comparable to the regimes governing either the SEC or the FDA. CERCLA prevents a PRP from challenging a UAO until it either pays EPA or EPA brings suit. Pet. App. 5a (discussing 42 U.S.C. § 9613(h)). Both the SEC and FDA schemes, in contrast, allow pre-deprivation recourse to federal courts. *See, e.g.*,

Sprecher v. Von Stein, 772 F.2d 16, 18 (2d Cir. 1985) (per curiam) (noting that an entity may contest "the validity of the SEC's investigatory motives or methods" by challenging an SEC subpoena under 15 U.S.C. § 78u(c)); *Genendo Pharm. N.V. v. Thompson*, 308 F. Supp. 2d 881, 885-86 (N.D. Ill. 2003) (noting that the recipient of an FDA warning letter may obtain a formal administrative ruling on the warning letter under 21 C.F.R. §§ 10.25, 10.30, and 10.85, and then obtain judicial review of the agency's response under 21 C.F.R. § 10.45(d)).

3. The Government likewise misapprehends (Opp. 17-23) the conflict the petition asserts with this Court's decision in *Connecticut v. Doehr*, 501 U.S. 1 (1991). *Doehr* held that consequential effects such as "cloud[ing] title" and "taint[ing] any credit rating" are themselves deprivations of property under the Due Process Clauses. *Id.* at 11. The D.C. Circuit held that "nothing in [*Doehr*] implies that consequential injuries, standing alone, merit due process protection." Pet. App. 16a. But the D.C. Circuit's reinterpretation of *Doehr* stands in stark contrast to this Court's holding that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Doehr*, 501 U.S. at 12; *see also id.* at 19 (plur. op.) (noting that "the impairments to property rights that attachments effect merit due process protection"), 22 (describing additional consequential harms that result in property deprivations).

The petition does not rely on *Doehr* for the proposition that "consequential harms *themselves* can constitute protected property interests," Opp. 17 (emphasis in original), but rather that the consequential

harms can deprive the owner of its pre-existing property rights that are plainly protected by state law. This is clear from the way in which the operative language of *Doehr* tracks the decision of the lower court in that case. *Compare Doehr*, 501 U.S. at 11 (An attachment "clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; [and] reduces the chances of obtaining a home equity loan."), *with Pinsky v. Duncan*, 898 F.2d 852, 854 (2d Cir. 1990) ("An attachment not only impairs the marketability of the real estate, but also may harm the owner's credit rating, and may prevent him from using the property as collateral for a loan."), *aff'd sub nom Doehr v. Connecticut*, 501 U.S. 1. In considering these consequential harms, *Pinsky* asked whether there was a "[d]eprivation of a [p]rotected [p]roperty [i]nterest?" And the Second Circuit answered in the affirmative, holding "that a nonpossessory attachment of real estate deprives the owner of a constitutionally protected property interest under the fourteenth amendment." 898 F.2d at 854. By explicitly agreeing with the Second Circuit's decision in *Pinsky*, *see Doehr*, 501 U.S. at 11, this Court left no doubt that it was likewise holding that consequential harms can deprive an owner of its property interests.

The Government is similarly hard-pressed to contest the conflict with *Pinsky*, *Doehr*, and the First Circuit's decision in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc), that arises from the D.C. Circuit's holding that *Doehr*'s operative language "comes not from the Court's analysis of whether attachment requires due process protection, but instead from the portion of its opinion weighing the significance of the private interests at stake," Pet. App. 15a. The First Circuit held squarely that, "in

light of [the same language], we cannot but conclude that the lien on real property . . . amounts to a *deprivation* of a 'significant property interest' within the meaning of the due process clause," *Reardon*, 947 F.2d at 1518 (emphasis added). For the same reason, the D.C. Circuit's holding also conflicts with the Rhode Island Supreme Court's decision in *Gem Plumbing & Heating Co. v. Rossi*, 867 A.2d 796, 807 (R.I. 2005), which also interprets *Doehr* as holding "that the effects of the attachment, primarily the clouding of title, deprive[] the property owner of a 'significant' property interest."

Seeking to minimize these conflicts, the opposition would distinguish this case based on the narrow fact that *Doehr* and *Reardon* dealt with liens or attachments, rather than a UAO. Opp. 20-21. The D.C. Circuit made no such distinction, *see* Pet. App. 15a-16a, and in any event, such a distinction fails. The opposition argues that *Doehr* and *Reardon* are inapplicable because they dealt with government instruments that were "attached to property or some other right and that may lessen its value." Opp. 20 (emphasis omitted). But a UAO does exactly the same thing: it attaches to a PRP's property and lessens its value—for example, the amount it would command in a sale. *See Black's Law Dictionary* (9th ed. 2009) (defining "value" as "the amount of goods, services, or money that something commands in an exchange"). The fact that UAOs devalue a PRP's property interest in the market value of a business enterprise rather than the market value of a bank account or a piece of real property does not alter the due process equation.

Thus, contrary to the opposition's suggestion, a UAO creates the same effects as the liens or attachments in *Doehr* and *Reardon*. As amicus Chamber of

Commerce observes, a UAO "impairs the company's right to dispose of property by limiting alienability," "deters potential buyers and mortgage lenders," and "reduces the company's stock value and credit rating." Chamber of Commerce Amicus Br. 10. The primary difference between the UAO here and the attachment at issue in *Doehr* is the label applied. But this Court has "consistently eschewed" the "[d]etermin[ation of] constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996).

The opposition fails as well in its attempt to reconcile this case with recent decisions from the Second and Third Circuits. The Second Circuit held that a state rule that delayed access to a property right was a deprivation of that right under, *inter alia*, *Doehr*, because the "property interest in the underlying asset suffers, as the [asset] depreciates over time." *Ford Motor Credit Co. v. N.Y.C. Police Dep't*, 503 F.3d 186, 192 (2d Cir. 2007). Similarly, relying on *Doehr*, the Third Circuit held that an assessment on an inmate's account was a deprivation of property because, "[a]s with [an] estate subject to an encumbrance, the economic value of [the inmate's] institutional account was reduced at the time of the Department of Corrections' assessment and remained impaired for upwards of three years." *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 281 n.2, 290 (3d Cir. 2008). Despite the opposition's reliance on form over substance, a lien, assessment, or UAO all deprive an owner of a property interest. Nor did the D.C. Circuit state otherwise, holding only that, regardless of form, consequential injuries do not merit due process protection. Pet. App. 16a.

The Government is likewise incorrect that a PRP has no "legitimate claim of entitlement" to its interest in its market value and credit rating. Opp. 16. While these harms are caused by market reactions, *Doehr* and three federal circuit courts squarely reject the opposition's contention that "consequential" harms cannot deprive a firm of its property.[1] Any argument that a PRP does not have a property interest in its credit rating or stock price is incorrect. While a stock price may fluctuate, the stock itself is "[t]he capital or principal fund raised by a corporation through subscribers' contributions or the sale of shares." *Black's Law Dictionary* (9th ed. 2009). By causing a $76.4 million drop in a company's stock price, Pet. App. 64a, a UAO literally deprives a company of $76.4 million worth of funding for operations. Likewise, as amici Finance Professors and Scholars make clear, a firm's credit rating directly affects its access to the "lifeblood" of credit, such that "[e]ven a modest decrease in a firm's credit rating can dramatically increase the interest rate that the firm must pay to

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[1] The additional cases cited in footnote 8 of the opposition, Opp. 20 n.8, are not to the contrary, as they either involve the "stigma-plus" test that is not at issue here, *see URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 11 (1st Cir. 2011) ("When a specified harm is predicated on voluntary third-party behavior, it cannot serve as a 'plus' factor."), or involve generalized administrative decisions not directed at a particular party, *see Nuclear Transp. & Storage, Inc. v. United States*, 890 F.2d 1348, 1354 (6th Cir. 1989) (holding that a change in the government's policy so as to allow for temporary, free storage of certain nuclear materials does not deprive a firm that holds a license to sell storage of the same material of its property); *Indus. Safety Equip. Ass'n v. EPA*, 837 F.2d 1115, 1112 (D.C. Cir. 1988) (holding that an agency's issuance of a report that disapproves of certain types of respirators does not deprive manufacturers of those respirators of their property).

obtain credit . . . [with] attendant consequences for a company, its stockholders, and its employees." Finance Professors and Scholars Amicus Br. 2-3. A UAO's detrimental effect on a PRP's stock price or credit rating is the functional equivalent of the federal government prohibiting certain firms from borrowing money or selling stock in specified amounts.

4. The Government's response to petitioner's *Ex Parte Young* claim is similarly unavailing. The factual record in this case, largely undisputed by the opposition, reveals a coercive impact so overwhelming that it "preclude[s] a resort to the courts" for the purpose of challenging government action. *Ex Parte Young*, 209 U.S. 123, 145-46 (1908). As established in the district court, of the 5,400 PRPs that have received a UAO over the last quarter century, Pet. App. 82a, only a minute portion ever elected to challenge a UAO, Pet. App. 202a. It is easy to see why: with costs of compliance averaging $4 million, Pet. App. 77a, and immediate market impacts from non-compliance averaging $76.4 million plus a significant increase in financing costs, Pet. App. 64a, 76a, combined with the threat of immense fines stretching to over $82 million *per violation*, Pet. App. 182a-83a, 197a, the "choice" is no choice at all. Due process principles "normally do not require [parties] to bet the farm by taking violative action before testing the validity of a law." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (ellipsis and internal quotation marks omitted) (citing, *inter alia*, *Ex Parte Young*, 209 U.S. 123). If the facts of this case do not establish a

forbidden Hobson's choice, then *Ex Parte Young* is a dead letter.[2]

The opposition also misapprehends petitioner's argument based on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Petitioner is not arguing that this case is "inconsisten[t]" with *Thunder Basin*, Opp. 13 n.5, but rather that this case is distinct from *Thunder Basin*, Pet. 22-23, in ways that point to a due process violation here. *Thunder Basin* held a statutory scheme consistent with *Ex Parte Young* because, although the penalties on the mine operators were "onerous," the mine operator could request expedited administrative proceedings and obtain temporary relief from a court of appeals. *Thunder Basin*, 510 U.S. at 218 (citing 30 U.S.C. §§ 815(d), 816(a)(2)). In contrast, because of the jurisdiction-stripping provision of 42 U.S.C. § 9613(h), a PRP must wait for EPA to "take its own sweet time before suing." *Reardon*, 947 F.2d at 1519. In the meantime, the PRP must wait, sometimes up to six years, *see* 42 U.S.C. § 9613(g)(2), for EPA to make its decision, with each day imposing an additional $37,500 per violation in contingent liability. The speculative possibility that a reviewing court might, after years of additional litigation, exercise restraint in assessing daily penalties, Opp. 14 n.6, is no solace to the PRP *ex ante* in deciding whether to comply. This case thus

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[2] Contrary to the Government's suggestion, petitioners are pursuing here, in addition to a facial challenge, the pattern and practice claim that created through discovery a clear record of the coercive effect of the UAO regime. The D.C. Circuit correctly upheld jurisdiction over this claim, Pet. App. 24a, 126a-127a, and a single sentence in a footnote, Opp. 10 n.4, is insufficient to contest this part of the Court of Appeals' decision.

presents a substantially more severe *Ex Parte Young* problem than *Thunder Basin*.

5. Finally, the opposition points to three alleged protections available to a PRP facing a UAO. Opp. 11-12. Each of these "protections" only serves to reinforce the unconstitutional nature of the UAO regime. *First*, the opposition claims that EPA may provide notice to a PRP that it will receive a UAO. Opp. 11. This notice is of little use: when one is tied to the tracks in the face of an oncoming train, it does not help if the train blows its whistle. Likewise, making a PRP aware that it is now tied to the tracks is of small comfort.

Second, the opposition argues that a PRP does not have to pay any money until EPA brings an enforcement suit. Opp. 11. This claim ignores the threat of massive fines and the immediate consequential harms addressed above. In any event, the blithe assurance that "the Sword of Damocles may not fall" provides no safety to those who sit beneath it.

Third, the opposition argues that a PRP can always pay the compliance costs and then later obtain reimbursement. Opp. 12. But this "solution" is itself a due process violation. Given that the Government has conceded that UAOs are not used in environmental emergencies and does not contest that the money spent on compliance costs is a protected property interest, Pet. App. 10a, 80a, the opposition's argument boils down to the claim that "a wrong may be done if it can be undone," *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972), an assertion this Court has long since rejected, *id.* Forcing a PRP to pay now, without judicial review, for a chance to recover later does little to "trim the horns" of any dilemma, Opp. 12; it merely exchanges one set of horns for another.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 10-871

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Supreme Court of the United States

GENERAL ELECTRIC CO.,

PETITIONER,

v.

LISA PEREZ JACKSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. At least 98% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber participated as an *amicus* in this case before both the court of appeals and the district court.

This case is especially important to the Chamber because of the Environmental Protection Agency's ("EPA's") longstanding pattern and practice of issuing Unilateral Administrative Orders ("UAOs") as a matter of course, in non-emergency situations,

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[1] Pursuant to Sup. Ct R. 37 2(a), *amicus curiae* notified the parties of its intent to file this brief 10 days prior to the date of filing. The parties have consented to the filing of this brief in letters submitted herewith or on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

without providing any pre-deprivation process before a neutral decisionmaker.

Administrative law is full of flexible procedures that constitutionally balance the government's need for flexibility with private citizens' right to due process, including the right to a hearing before a neutral decisionmaker before (or, in an emergency, promptly after) any deprivation occurs. Nonetheless, the D.C. Circuit blessed the Environmental Protection Agency's ("EPA's") aberrational practice of routinely issuing in non-emergency situations aptly named Unilateral Administrative Orders, without pre-issuance process before a neutral decisionmaker, to any company it deems potentially responsible for a violation of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq* The D.C. Circuit's decision encourages EPA's unbridled use of the coercive tool of UAOs to compel companies to undertake costly site clean-ups, irrespective of their liability for the underlying environmental damage. That practice exposes Chamber members to billions of dollars in costs, damages, and devastating market impacts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is essentially whether due process jurisprudence should account for the enormous consequences EPA imposes when it routinely employs a drastic administrative weapon Congress designed only for emergencies. The court of appeals acknowledged that the "consequences of UAOs can be substantial." Pet. App. 32a. Indeed, as

the district court found, UAOs can drive companies out of business.

Companies have devoted billions of dollars to complying with UAOs. But the consequences of non-compliance, which are at issue here, are even greater. A UAO immediately adjudicates the company legally culpable and recalcitrant if it opts not to comply. A UAO reduces the company's stock value and credit rating, which increases the company's cost of capital. A UAO impairs the company's right to dispose of the relevant real property. And companies have no realistic way to challenge UAOs because there is no right to timely judicial review (whether they comply or not).

Nonetheless, the D.C. Circuit held that those substantial consequences trigger *no* due process scrutiny because they do not amount to a deprivation of property. If that were correct, the Due Process Clause would provide far more protection for the repossession of a toaster than for the destruction of millions of dollars in market value, and the attendant limitations on the alienability of the affected real property.

But the court of appeals' extreme position — that "consequential" injuries categorically do not so much as trigger due process concerns, in any circumstances and no matter how grave the injury — is incorrect. Indeed, it is contrary to this Court's 20-year-old decision in *Connecticut v. Doehr*, 501 U.S. 1 (1991), which recognizes that liens and similar attachments may trigger due process protections. The court of appeals' strained interpretation, moreover, would have dramatic consequences if left

uncorrected. A company's impaired capacity to enter into the financial markets and to secure equity and debt financing critically undermines its ability to provide services, make products, hire and retain employees, pursue business opportunities and upgrades, and make vital investments in research and development in today's economy. In dismissing such harms to businesses' fundamental property rights as being constitutionally inconsequential, the decision below sets a dangerous precedent by which the executive and legislative branches can adjudicate industry liability and coerce industry compliance without the checks and balances of independent judicial review afforded by the Due Process Clause.

The court of appeals further erred when it concluded that the UAO scheme is insufficiently coercive to violate the Due Process Clause under *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny. The D.C. Circuit invoked the illusory specter that UAO recipients may challenge them in court by opting not to comply and awaiting an enforcement action — even though enormous daily penalties could continue to accrue while EPA took full advantage of a lengthy statute of limitations to let the potential penalties become unbearable before the agency would so much as file an enforcement action. The extensive record in this case proves that the penalties for noncompliance are so coercive that nearly all UAO recipients have capitulated and paid billions of dollars in clean-up costs rather than invoke their right to judicial review. UAO recipients simply cannot risk the consequences of noncompliance. Those very real burdens cannot be

discounted, and they give rise to a violation of the Due Process Clause under *Ex Parte Young*.

Precisely because EPA's unilateral orders violate the most basic due process rights, they are an outlier in administrative law. Numerous administrative law schemes provide pre-deprivation process, or at least prompt post-deprivation process, in situations involving genuine emergencies. But EPA admits that it does not use UAOs in emergencies; instead, it uses them as a matter of course in routine CERCLA matters — and has therefore issued more than 1,700 UAOs to more than 5,400 companies. Requiring EPA to provide basic due process protections would merely bring its UAO scheme into line with other regulatory schemes. In contrast, sanctioning this UAO regime would give other agencies every incentive to mimic it, further underscoring the importance of the issue.

ARGUMENT

I. THE DECISION BELOW UNDULY LIMITS CONSTITUTIONALLY COGNIZABLE DEPRIVATIONS OF "PROPERTY."

A. The Decision Below Creates Confusion Over Whether Consequential Injuries Trigger Due Process Protections.

Questions of procedural due process entail a familiar two-step inquiry: first, whether the challenged deprivation was a denial of "property" or "liberty" within the meaning of the due process clause; and second, whether the procedures attendant to any deprivation are constitutionally sufficient. *See Ky. Dep't of Corr. v. Thompson*, 490

U.S. 454, 460 (1989). The decision below strained to dismiss the significant harms that UAOs effect on recipient companies at the first, threshold step — holding categorically that "consequential injuries," no matter how severe, do not implicate due process at all. Pet. App. 13a-23a.

While not every injury amounts to a cognizable denial of "property," *see Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court has continually made clear that whether a challenged deprivation triggers due process protections depends very much on its consequences. In *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988), for example, this Court held that "state procedures for creating and enforcing ... liens are subject to the strictures of due process" where the lien's very issuance triggers "serious consequences." *Id.* at 85; *see also id.* at 86 (emphasizing "substantial adverse consequences"). The Court explained that even when no execution sale of the property has yet occurred, the very filing of the lien creates "a cloud on appellant's title," "encumber[s] the property and impair[s] appellant's ability to mortgage or alienate it." *Id.* at 82, 85. That the "judgment against [a party] *and the ensuing consequences* occurred without notice ... and ... an opportunity to be heard" amounted to a due process violation. *Id.* at 86 (emphasis added); *see also Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604 (1974); *Hodge v. Muscatine County*, 196 U.S. 276, 281 (1905).

In *Connecticut v. Doehr*, 501 U.S. 1 (1991), this Court directly imported that holding about liens into the context of attachments and similar encumbrances on property. "*Without doubt*," the

Court declared, "state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" 501 U.S. at 12 (quoting *Peralta*, 485 U.S. at 85) (emphasis added). Acknowledging that pre-judgment attachment did "not amount to a complete, physical, or permanent deprivation of real property" and had an impact "less than the perhaps temporary total deprivation of household goods or wages," the Court nonetheless cautioned that due process protections are not confined to such "extreme" deprivations. *Id.* at 12. Again, the Court underscored the significant "consequences" of the challenged act: "attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Id.* at 11-12; *see also id.* at 27-28 (Rehnquist, J., concurring in part and concurring in the judgment) (quoting same language in agreeing that due process protections were triggered despite owner's "undisturbed possession" of property).

Thus, this Court and the courts of appeals have long understood that, where the consequences are sufficiently grave, "even the temporary or partial impairments to property rights that attachments, liens, *and similar encumbrances* entail are sufficient to merit due process protection." *Id.* at 12 (emphasis added); *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 298-300 (1981) (immediate cessation order halting surface mining operations was cognizable deprivation of property);

Burns v. Pa. Dep't of Corr., 544 F.3d 279, 281, 288-91 (3d Cir. 2008) (assessment of inmate account for medical expenses, even absent deduction of funds, was cognizable deprivation of property); *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1258-59 (11th Cir. 2003) (administrative compliance order was more than "merely a complaint-like instrument with no legal significance" and violated due process); *United States v. 408 Peyton Road SW*, 162 F.3d 644, 650-51 (11th Cir. 1998) (en banc) (arrest and seizure warrants for property, even absent physical seizure, were cognizable deprivations of property); *Reardon v. United States*, 947 F.2d 1509, 1523 (1st Cir. 1991) (en banc) (CERCLA lien, even absent a final liability determination, was cognizable due process deprivation).

The D.C. Circuit, however, adopted the extreme position that "nothing" even "implies" that consequential injuries can merit due process protection. Pet. App. 16a. The D.C. Circuit read *Doehr* only for the narrow and limited proposition that consequential injuries may impact how much process is due, but not the antecedent issue "*whether* attachment requires due process protection." Pet. App. 15a-17a (emphasis in original). That strained parsing cannot be squared with this Court's opinion, which explicitly described the aforementioned "consequences" on title, alienability, and financing as "*property interests* that attachment affects" and that "trigger due process concern." 501 U.S. at 11-12 (emphasis added).

Nor can that narrow view of the relevance of consequential injuries be squared with decisions of the First, Second, and Third Circuits and numerous

state supreme courts, as described in the Petition. *See* Pet. 15-19. For example, the First Circuit's opinion in *Reardon* quoted *Doehr*'s "consequences" language in a subsection entitled "The Deprivation," before moving on to a subsection entitled "What Process Is Due" — thus considering consequential injuries at the *first* step of the due process inquiry. *See* 947 F.2d at 1518.

By relegating the relevance of consequential injuries to the *second* step alone, the D.C. Circuit treated severe consequential injuries as being irrelevant to whether any due process protection applies at all. The court thereby departed from precedents of this Court and the courts of appeals, furthering the lower courts' uncertainty about the basic contours of due process protection.

B. The Decision Below Erroneously Held That UAOs Do Not Trigger Due Process Protections.

The court of appeals' error was outcome-determinative because UAOs have substantially the same effects as liens and other direct encumbrances on property rights that this Court has long recognized as meriting due process protection.

Doehr's critical holding — that "temporary or partial impairments to property rights that attachments, liens, *and similar encumbrances* entail are sufficient to merit due process protection," 501 U.S. at 12 (emphasis added) — requires courts to assess whether a challenged action has impacts sufficiently "similar" to those of liens or attachments. *See Reardon*, 947 F.2d at 1518 (CERCLA lien "amounts to deprivation of a 'significant property

interest'" because it "has *substantially the same effect ... as the attachment* had on the plaintiff in *Doehr* — clouding title, limiting alienability, affecting current and potential mortgages.") (emphasis added).

The D.C. Circuit, however, emphasized that UAOs are not attachments, and left its reasoning at that. *See* Pet. App. 16a. The D.C. Circuit thus wholly bypassed the requisite assessment of whether UAOs' effects on title, alienability, or financing are sufficiently analogous to those of liens or attachments.

They are. Like a lien, a UAO does not deprive the recipient of the physical use or possession of its property, but a UAO's impact on the affected property is nonetheless immediate and palpable: The UAO impairs the company's right to dispose of the property by limiting alienability. It deters potential buyers and mortgage lenders by leaving them uncertain as to the extent of the ultimate liability. Even beyond the specific property or operation implicated, the UAO reduces the company's stock value and credit rating. *See* Pet. App. 60a, 71a. Moreover, the imposition "may be in place for a considerable time without an opportunity for a hearing," since CERCLA's statute of limitations throws the judicial determination "so far into the future as to render it inadequate." *Reardon*, 947 F.2d at 1519-20.

As the petition explains, therefore, the concrete consequences of EPA's routine issuance of thousands of UAOs in non-emergency situations cannot be overstated. *See* Pet. 26-27. A UAO's extraordinary

consequences can literally put smaller businesses out of business, as the district court recognized. Pet. App. 77a. And while a company may or may not be greater than the sum of its parts, its very existence is surely a weightier due process interest than the toaster in its lunch room, which cannot be reclaimed without due process protections. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 89-90 (1972).

It is also completely unnecessary for EPA to impose those burdens unilaterally, without process before a neutral decisionmaker. EPA has alternatives for forcing a party to clean up a site in a non-emergency situation that comply with due process. For example, Congress authorized EPA to seek an order from a federal district court compelling a company to perform a clean-up. 42 U.S.C. § 9606(a). But few seek judicial approval for that which they can compel unilaterally, and thus EPA has preferred UAOs to the rigors of providing notice and an opportunity to be heard. As a result, EPA no longer goes to court to seek a clean-up order. Instead, it relies upon the expedience of UAOs and has issued over 1,700 of them to more than 5,400 companies — which averages "approximately six UAOs to nineteen [companies] every *month*." Pet. App. 82a. It is certainly understandable that EPA would choose to issue unilateral orders rather than prove its case before a neutral decisionmaker. But the Due Process Clause does not leave that choice with the agency. *See Fuentes*, 407 U.S. at 90 & n.22.

Nevertheless, the decision below treats the severe burdens that UAOs pose on their recipients as legally irrelevant. It ignores how, in the modern economy, impairing businesses' capacity to enter into

the financial markets and to secure equity and debt financing dramatically undercuts their provision of good and services, hiring, and critical investments in business upgrades and research and development. *See* Pet. 27-28. By giving EPA a blank check to impose such devastating burdens on the property rights of businesses through routine adjudicatory acts, the decision below sets a troubling precedent, encouraging other agencies to adopt similar schemes insulated from the checks and balances of independent judicial review. The D.C. Circuit's opinion, if left unreviewed, invites regulatory overreach with rippling effects well beyond the CERCLA context. CERCLA alone has generated well over $5 billion in response costs by complying recipients. If the executive and legislative branches use unilateral orders to adjudicate industry liability other contexts without heed to economic realities or due process restrictions, businesses will no doubt be saddled with billions more in coerced compliance costs and exponentially greater harms.

II. THE UAO REGIME IS EXTRAORDINARILY COERCIVE.

The UAO scheme violates due process for the additional reason that CERCLA's penalties are "so enormous ... as to intimidate" UAO recipients from "resorting to the courts to test [an order's] validity" before complying with it. *Ex Parte Young*, 209 U.S. 123, 147 (1908). The D.C. Circuit based its contrary holding on the assumption that recipients can readily obtain pre-deprivation judicial review of a UAO by refusing to comply and forcing EPA to sue them in court. That assumption blinks reality.

It ignores *statistical* realities, as borne out by the uniquely developed record in this case. Experience amassed over the last three decades has shown that of the more than 5,400 recipients of UAOs, "very few ... have ever dared defy a UAO in order to challenge its validity through independent judicial review." Pet. 25; *see also* Pet. 20-21. Only a bare handful of UAO recipients have ever sought or obtained independent judicial review of an order. *See* Pet. 8, 21.

It also blinks *economic* realities. The costs of compliance are significant; UAO recipients have spent over $5 billion in response costs at CERCLA sites over the past thirty years. *See* Pet. 3. But the costs of non-compliance are undeniably greater. A party that does not greet a UAO with immediate compliance faces penalties of up to $37,500 *per day*. *See id.*; *see also* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 40 C.F.R. § 19.4. These severe penalties accrue until EPA, in its sole discretion, decides to bring suit after the agency has funded a clean-up. Penalties can total $36 million when, as in the average case, the clean-up takes three years. Penalties can top $130 million when EPA waits the full six years to bring suit against the UAO recipient, as is its statutory right. *See* 42 U.S.C. § 9613(g)(2). EPA, moreover, may seek punitive damages of up to three times the clean-up costs. *See* 42 U.S.C. § 9607(c)(3). This is, quite simply, regulation-by-sledgehammer.

At the same time, a non-complying UAO suffers market impacts on its stock price, brand value, and cost of financing that dwarf these severe fines and penalties. Those market impacts have immediate real-world impact on a company's ability to hire and

its relationships with stakeholders. Worse, those impacts can plague a company for years as the government "'take[s] its own sweet time before suing,'" Pet. 21 (citation omitted) — leaving the company with no hearing before a neutral decisionmaker until EPA brings suit many years later. *See* 28 U.S.C. § 2462.

At bottom, UAOs are so highly coercive that the recipient has no real choice but to comply. Although the D.C. Circuit inexplicably deemed the non-compliance rate "sufficiently numerous" to foreclose any suggestion that UAO recipients are coerced into compliance, *id.*, that completely misses the mark. By any measure, very few UAO recipients have ever opted not to comply with a UAO in order to challenge it in court.

Given the substantial costs of compliance, the real question is why any company would foot the bill before its day in court. The fact that all but a handful of the thousands of UAO recipients pay the substantial costs of compliance is irrefutable evidence that the coercion is real. The few companies that elected to seek judicial review are isolated exceptions that merely prove the rule — companies that either lacked the resources to comply with a UAO and were forced to take their chances, or perhaps miscalculated and served as a cautionary tale for industry peers. For all but the truly desperate or reckless, non-compliance is only an illusory option — available in theory, but not a meaningful path to judicial review in practice. The "result is the same as if the law in terms prohibited the [party] from seeking judicial [review]" at all. *Ex Parte Young*, 209 U.S. at 147.

Thus, despite the impositions of thousands of UAOs and billions of dollars in attendant liabilities over three decades, courts have played little role in overseeing UAOs. In effect, legal standards governing UAOs and EPA's issuance of them remain as non-existent as they were at the incipience of EPA's UAO practice.

The court of appeals erred by treating the theoretical availability of judicial review, instead of the proven reality of the situation, as dispositive. *Ex Parte Young* explicitly called for courts to look not to possibilities in the abstract, but to concrete "result[s]." *Id.* Yet the D.C. Circuit erroneously determined that UAO recipients face no dilemma only by discarding the "result[s]" of the last three decades. The D.C. Circuit stated that a non-complying company would not necessarily face the onerous fines and penalties associated with non-compliance, because a court must find that the UAO was proper and that the recipient "willfully" failed to comply "without sufficient cause," *see* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3), and retains the discretion to withhold fines and treble damages.

In actuality, the purported "safeguards" afford cold comfort to UAO recipients — which is why recipients overwhelmingly choose to incur the high costs of compliance. Pet. App. 11a. That companies could theoretically avoid a massive contingent liability if they had "sufficient cause" not to comply is of little moment where recipients are at a loss as to what defenses are "sufficient." *See Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 391 (8th Cir. 1987) (calling on EPA to develop guidance on the contours of "sufficient cause"); *cf. Reisman v. Caplin*,

375 U.S. 440, 446-50 (1964) (contemplating less vague "good faith" defense). Similarly, that courts theoretically "may" exercise judicial discretion over CERCLA penalties is of little significance where companies have little inkling as to whether or how a court would exercise that discretion in any given case. And the proof is in the proverbial pudding — the fact that virtually every UAO recipient chooses to incur high compliance costs instead of risk the consequences of non-compliance is all one needs to know about the unilateral orders' extremely coercive effect.

III. THE UAO SCHEME IS AN ABERRATION AMONG ADMINISTRATIVE LAW STATUTES.

The UAO scheme's deviation from fundamental due process principles is underscored by its deviation from other administrative law regimes. EPA's unilateral orders are so coercive, and their consequences so dire, that one would expect *heightened* procedures to apply to their issuance. Yet EPA routinely issues UAOs with significantly *less* process than other agencies use in circumstances implicating far less weighty private interests and far greater exigencies.

Other comparable regulatory schemes afford recipients of adjudicatory orders either a prior hearing before a neutral decisionmaker or a prompt opportunity for independent review after the order is issued. *See* Pet. 23 & n.11. CERCLA's UAO scheme does neither. Indeed, it not only fails to provide prompt pre-deprivation review, it expressly *precludes* such review by stripping federal courts of

jurisdiction to hear declaratory challenges. *See* 42 U.S.C. § 9613(h) (precluding federal court challenges to UAOs until orders are complied with or EPA brings suit). Holding EPA to bedrock constitutional requirements would hardly threaten the operation of the modern administrative state. To the contrary, it would bring the aberrational UAO scheme in line with the procedures already adhered to by other agencies.

1. Most administrative law statutes provide pre-deprivation process. That is so even when the private interests are less weighty and there is a more pronounced governmental urgency. The Consumer Product Safety Act, 15 U.S.C. §§ 2051-2089, for example, requires the Consumer Product Safety Commission ("CPSC") to file a district court action against an "imminently hazardous consumer product" and its manufacturer, distributor, or retailer, where the product presents an "imminent and unreasonable risk of death, serious illness, or severe personal injury." *Id.* § 2061(a). Notwithstanding the grave hazards posed by the product, Congress still requires the CPSC to bring an action in an Article III court before halting the manufacture or distribution of the product. *See id.* §§ 2061(a), (b).

In similar fashion, the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, requires the Secretary of Labor to petition a federal district court if it seeks to "restrain any conditions or practices in any place of employment." *Id.* § 662(a). Again, the statute requires such pre-deprivation judicial process even where the underlying violations can

reasonably be expected to "cause death or serious physical harm immediately." *Id.*

Likewise, the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692, requires the EPA Administrator to commence a civil action in federal district court in order to seize an "imminently hazardous chemical substance" or obtain relief against persons who manufacture, process, distribute, or use such substances. *See id.* § 2606.

In regulatory schemes that do not involve a pronounced interest in speed, as here, pre-deprivation process is even more common. For instance, under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, the Federal Trade Commission may bring suit in federal district court to seek an injunction where a person "is violating, or is about to violate, any provision of law enforced by the [Commission]" and an injunction "would be in the interest of the public." *Id.* § 53(b).

2. In *true* emergencies readily distinguishable from the circumstances in which EPA employs UAOs, administrative law statutes typically provide, at a minimum, for prompt post-deprivation process. The Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.*, authorizes the Secretary of Energy to issue orders to "prohibit the dissemination" of sensitive information related to nuclear weapons and atomic energy, in light of the critical governmental interests in secrecy concerning nuclear weapons and energy and the prevention of nuclear proliferation. *Id.* § 2168(a)(2). The Secretary may issue such orders where "dissemination of such information could reasonably be expected to have a significant adverse effect on

the health and safety of the public or the common defense and security by significantly increasing the likelihood of (A) illegal production of nuclear weapons, or (B) theft, diversion, or sabotage of nuclear materials, equipment, or facilities." *Id.* But anyone affected by such an order may seek immediate judicial review. *See id.* § 2168(d) (citing 5 U.S.C. § 552(a)(4)(B)). Even in this near-doomsday scenario, the statutory regime provides for immediate post-deprivation review.

Similarly, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, compensates for the lack of a *pre*-deprivation remedy by providing prompt *post*-deprivation process. *Id.* § 78y(a). The Act authorizes the Securities and Exchange Commission ("SEC") to summarily take action to restore order to financial markets and ensure proper settlement of transactions in emergencies — namely, "major market disturbance[s]" such as "sudden and excessive fluctuations of securities prices generally" or major disruption to "the functioning of securities markets." *Id.* §§ 78*l*(k)(2), (7)(A). Even in these emergency situations, however, the Act provides for expeditious post-deprivation review in a United States Court of Appeals. *Id.* § 78y(a).

The Commodity Futures Trading Commission Act, 7 U.S.C. §§ 1 *et seq.*, likewise allows unilateral action in emergencies but permits post-deprivation judicial review. The Act authorizes the Commodity Futures Trading Commission ("CFTC") "to direct" certain parties to set "temporary emergency margin levels on any futures contract" when the Commission "has reason to believe that an emergency exists." *Id.* § 12a(9). But it also permits an affected party to

seek review immediately before a United States Court of Appeals. *Id.*

Meanwhile, the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, allows the EPA Administrator to issue "emergency orders" where "necessary to protect public health or welfare or the environment" without filing a civil action in federal court, as it would in an ordinary abatement action. *Id.* § 7603. But even these emergency orders can remain in effect for "not more than 60 days," unless the EPA Administrator brings an action in federal court to seek an extension. *Id.*

3. Another category of administrative law statutes provides dual tracks for emergency and non-emergency situations. Those statutes reflect Congress's understanding that the degree of due process protection is appropriately tethered to the degree of underlying exigency.

Under the Federal Aviation Act, 49 U.S.C. §§ 40101 *et seq.*, the Administrator of the Federal Aviation Administration may suspend or revoke an operating license for purposes of safety or otherwise to protect the public interest. *Id.* § 44709(b). Notice and "an opportunity to answer" are mandated, "[e]xcept in an emergency." *Id.* § 44709(c). In an emergency, the Administrator's order becomes effective immediately, *id.* § 44709(e)(2), but the affected party may immediately submit a petition for review by the National Transportation Safety Board ("NTSB"), *id.* § 44709(e)(3). The NTSB must review and decide the petition no more than *five days* after it is filed. *Id.*

The Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, employs a similar dual scheme. In non-emergency situations, the Secretary of the Interior, who has authority to investigate violations, must "issue a notice to the permittee" and "provid[e] opportunity for public hearing." *Id.* § 1271(a)(3). By contrast, in emergency situations involving "imminent danger to the health or safety of the public" or "imminent environmental harm," the Secretary has authority to issue a cessation order without providing pre-deprivation process. *Id.* § 1271(a)(2). The adversely affected party, however, may immediately seek relief from the order, and the Secretary must respond to the request within five days. *Id.* § 1275(c). If unsuccessful, the affected party may then seek an adjudicatory hearing followed by judicial review. *Id.* § 1276. Because the "mine operators are afforded prompt and adequate post-deprivation administrative hearings and an opportunity for judicial review," these emergency cessation orders provide adequate due process. *Hodel*, 452 U.S. at 303.

Likewise, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y, distinguishes between "imminent hazard" situations and "emergency" situations. *See id.* § 136d(c). If the EPA Administrator determines that suspension of a pesticide registration is necessary to prevent an "imminent hazard," he or she must notify the registrant prior to any suspension so the registrant has an opportunity to seek an administrative hearing as to whether an "imminent hazard" in fact exists. *Id.* § 136d(c)(1). Any hearing, moreover, must take place within five days of the request for

that hearing. *Id.* § 136d(c)(2). Any final order following an expedited hearing is then subject to immediate judicial review in district court. *Id.* § 136d(c)(4). If, on the other hand, the EPA Administrator determines that an "emergency" prevents a pre-suspension administrative hearing, the suspension is immediately reviewable by a district court. *Id.* § 136d(c)(3)-(4).

4. Against that broader background of administrative practice, EPA's UAO scheme represents an extreme outlier. To be sure, as the D.C. Circuit noted, EPA issues similar orders under other environmental statutes and requires recipients to comply without affording prior trial-type hearings. *See* Pet. App. 33a (citing C.A. Amicus Br. of Nat. Res. Def. Council, et al. 30-33, which cited provisions of the Clean Air Act, 42 U.S.C. § 7413, Clean Water Act, 33 U.S.C. § 1319, and Resource Conservation and Recovery Act, 42 U.S.C. §§ 6934, 6973). But the EPA's broader pattern and practice of issuing onerous unilateral administrative orders only underscores the practical importance of the issue.

Tellingly, a number of lower courts have expressed skepticism of the constitutionality of the orders EPA issues under other environmental statutes. In the most striking example, the Eleventh Circuit held unconstitutional the Clean Air Act's scheme for issuing "administrative compliance orders." *Tenn. Valley Auth.*, 336 F.3d at 1258-59; 42 U.S.C. § 7413. The Eleventh Circuit reasoned that, to the extent that noncompliance with the orders triggered severe civil and criminal penalties without a "full and fair hearing before an impartial tribunal," the statute violated fundamental principles of due

process. *Tenn. Valley Auth.*, 336 F.3d at 1258-60; *see also Sackett v. EPA*, 622 F.3d 1139, 1145 (9th Cir. 2010) (adopting narrowing construction of Clean Water Act compliance orders provision but noting that "literal" reading of CWA ... could indeed create a due process problem"); *Armco, Inc. v. EPA*, 124 F. Supp. 2d 474, 477-78 (N.D. Ohio 1999) (concluding that a Resource Conservation and Recovery Act order comported with due process, but warning EPA that "the Court can conceive of some pre-enforcement orders where due process concerns would be implicated").

That makes this Court's review of the UAO scheme all the more critical. There is nothing unique about EPA, CERCLA, or any other environmental statute that would warrant an exception to the fundamental principles of due process that are widely applied by other agencies. To the contrary, as noted above, some other environmental statutes require EPA to follow traditional due process principles, and there is no indication that those statutes have proven to be unworkable. In addition, EPA's capacity under CERCLA to seek an abatement order in court or to undertake clean-ups directly shows that there is no need for EPA to issue UAOs *even in true emergencies*. Pet. App. 182a. In fact, EPA has admitted that it does not issue UAOs in true emergencies. That makes it absurd for EPA to issue UAOs without traditional due process protections in routine, non-emergency situations, especially considering the severe and immediate consequences for UAO recipients.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Supreme Court of the United States

GENERAL ELECTRIC CO.,
Petitioner,

v.

LISA PEREZ JACKSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FINANCE PROFESSORS AND SCHOLARS AS *AMICI CURIAE*

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BRIEF OF FINANCE PROFESSORS AND SCHOLARS AS *AMICI CURIAE*

STATEMENT OF INTEREST[1]

Amici curiae are finance professors and scholars who teach and write on corporate finance and financial economics. *See* Appendix of *Amici Curiae*. *Amici*'s academic work has included a focus on the

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief.

real effects of financial constraints—*i.e.*, limitations on the availability of credit or increases in the cost of financing—on firms' behavior and policies. *Amici* Professors Campello, Graham, and Harvey, for instance, recently published an article in the Journal of Financial Economics addressing the real business effects of financial constraints on firms during the recent global credit crisis. *See* Murillo Campello, John R. Graham & Campbell R. Harvey, *The Real Effects of Financial Constraints: Evidence from a Financial Crisis*, 97 J. Fin. Econ. 470, 471 (2010). Their research bears directly on the issues in this case. *See* Pet. 27-28.

Based on their expertise, *amici* are well positioned to explain the real effects of financial constraints suffered by firms as a result of action—including unilateral government action—that limits the availability and increases the cost of financing. *Amici* believe that a more fulsome understanding of the business ramifications of such constraints will aid the Court's assessment of the issues in this case.

SUMMARY OF ARGUMENT

From the Great Depression to the recent financial crisis, this Nation has recognized that credit is the "lifeblood" of business, of jobs, and of our economy. *See* President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009) ("the flow of credit is the lifeblood of our economy"); President Herbert Hoover, Address at Des Moines, Iowa (Oct. 4, 1932), *in The Public Papers of the Presidents of the United States: Herbert Hoover, 1932–1933* 467 (1977) ("credit is the lifeblood of business, the lifeblood of prices and jobs"). In order to operate—that is, to acquire, use, and dispose of the things that companies own—companies need access to credit.

We understand the D.C. Circuit in this case held that U.S. companies have no protected interest under the Due Process Clause in "the market's assessment of their . . . credit worthiness"—*i.e.*, their credit ratings. Pet. App. 13a. The creditworthiness of firms and whether firms have access to credit markets based on their credit ratings is a question of significant national importance. Research shows that U.S. firms that faced financial constraints—*i.e.*, limitations on the availability or increases in the cost of financing—during the recent credit crisis experienced sharp declines in all areas of their business. Pet. 27-28 (citing Murillo Campello, John R. Graham & Campbell R. Harvey, *The Real Effects of Financial Constraints: Evidence from a Financial Crisis*, 97 J. Fin. Econ. 470, 471 (2010)).

Amici, who have studied and taught these issues for years, submit this brief to further explain the recent literature and real-world effects of such constraints, including those caused by credit rating downgrades. *Amici*'s work and the leading research in this area reflect that credit rating downgrades may impose a financial constraint on firms by raising their cost of borrowing and limiting their access to credit. Even a modest decrease in a firm's credit rating can dramatically increase the interest rate that the firm must pay to obtain credit and a downgrade has attendant consequences for a company, its stockholders, and its employees. Firms facing financial constraints often must shed employees; cut spending on technology, marketing, and investment; burn through cash reserves; and forgo or decrease dividend payments. Constrained firms' future investment opportunities are distorted, and financial constraints may even lead to firm failure.

In evaluating the D.C. Circuit's view that such interests are not afforded due process protection, we believe *amici*'s perspective highlighting the real effects of financial constraints on firms and the vast national importance of these issues may be of assistance to the Court.

ARGUMENT

THE AVAILABILITY AND COST OF CREDIT ARE CRITICAL TO FIRMS' ABILITY TO OPERATE

A. Credit Rating Downgrades Limit the Availability of Credit and Increase its Cost to Firms

Credit rating agencies, such as Standard & Poor's, Moody's, and Fitch, provide evaluations of the creditworthiness of firms both generally and with regard to specific debt securities, such as bond issuances. *See* John Patrick Hunt, *Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement*, 2009 Colum. Bus. L. Rev. 109, 114-15 (2009). These ratings facilitate outside investment in firms by providing a third party assessment of a firm's credit risk. *See* Erin M. Wessendorf, *Regulating the Credit Rating Agencies*, 3 Entrepreneurial Bus. L.J. 155, 156 (2008). Corporate executives also rely heavily on credit ratings to determine the appropriate amount of debt for their firms. *See* John R. Graham & Campbell R. Harvey, *The Theory and Practice of Corporate Finance: Evidence from the Field*, 60 J. Fin. Econ. 187, Table 6 (2001) (57% of chief financial officers ("CFOs") in a survey reported that credit ratings were "important" or "very important" to their assessment of how much debt to issue).

Even a modest change in a firm's credit rating can have measurable effects on the availability and cost of credit, as shown by recent studies of the 1982 Moody's credit rating refinement. *See, e.g.*, Tony T Tang, *Information Asymmetry and Firms' Credit Market Access: Evidence from Moody's Credit Rating Format Refinement*, 93 J. Fin. Econ. 325, 350 (2009) (examining the impact of Moody's credit rating refinement on corporate financing policies and real outcomes); Doron Kliger & Oded Sarig, *The Information Value of Bond Ratings*, 55 J. Fin 2879, 2881 (2000) (finding that the refinement had substantial effects on firms' bond prices and stock values). Before 1982, Moody's reported firms' creditworthiness using nine credit rating classes ranging from "Aaa" to "C." Tang, *supra*, at 327. In April 1982, however, without advance public notice, Moody's expanded this system to 19 rating classes by introducing numerical modifiers to the former classes Aa, A, Baa, Ba and B Within those rating classes, Moody's assigned a modifier 1, 2, or 3 to indicate the best, average, and worst credit quality. Importantly, this rating refinement was not related to any changes in firms' underlying risk profiles, but rather was implemented solely to improve information disclosure. The refinement thus provided a unique opportunity to study the impact of changes in credit ratings on the availability and cost of credit *Id.* at 327-38

One leading peer-reviewed article compared the effects of the refinement on firms that experienced a credit rating upgrade (that is, they received a 1 modifier) and those that were downgraded (that is, they received a 3 modifier). *Id.* at 327 The article concluded: "Better ratings allow [firms] to have better capital market access, both in terms of the cost of borrowing and the amount of debt issued." *Id.*

In particular, downgraded firms on average experienced a 15-30 basis point increase in their cost of borrowing relative to upgraded firms. *Id.* at 333. This significant change in firms' borrowing costs illustrates the noticeable consequences of even slight changes in credit ratings.

The Moody's refinement also illustrates the impact of changes to a firm's credit rating on the firm's access to credit markets. In the year following the refinement, downgraded firms issued significantly less debt than upgraded firms, indicating that "firms with better credit quality can now tap into the long-term debt market more easily." *Id.* at 337; *see also id.* at 331, Figure 1.

Another recent study of firm behavior during the 2008 credit crisis further demonstrates the connection between credit ratings and financial constraints. In a survey of CFOs worldwide, only 13% of CFOs from firms rated "investment" grade reported experiencing financial constraints during the 2008 crisis, whereas nearly half of CFOs from firms with "speculative" grade credit ratings reported being constrained. Murillo Campello, John R. Graham, & Campbell R. Harvey, *The Real Effects of Financial Constraints: Evidence from a Financial Crisis*, 97 J. Fin. Econ. 470, 476 (2010).[2]

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[2] According to Standard & Poor's, "investment" grade means a rating of BBB- or above, and "speculative" grade means BB+ or below. *See* Standard & Poor's Credit Ratings Definitions & FAQs, *available at* http://www.standardandpoors.com/ratings/definitions-and-faqs/en/us.

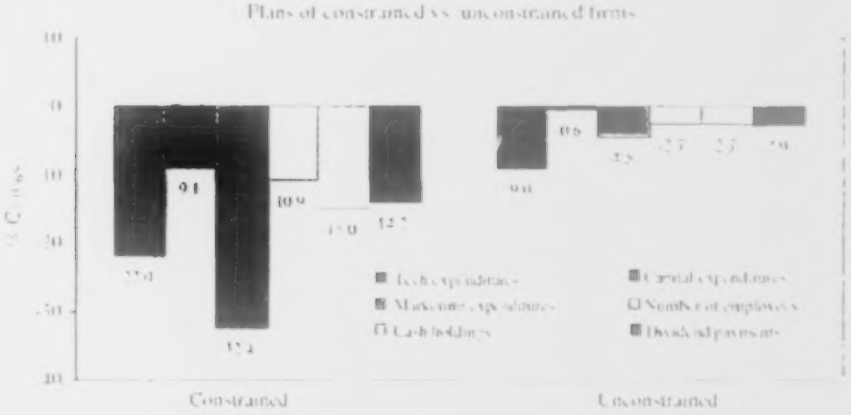
B. Financial Constraints Have Significant Adverse Effects on Firms' Behavior and Performance

Evidence from the recent global credit crisis powerfully illustrates the real effects of constraints upon the availability or cost of financing to firms. While the downturn provided a unique opportunity to study the impact of financial constraints on firms, the research findings also apply in other settings.

In a comprehensive study, Campello, Graham, and Harvey (2010) analyzed the results from a survey of 1,050 chief financial officers ("CFOs") in 39 countries in North America, Europe, and Asia in December 2008. *See* Campello et al., *supra*, at 470. The survey asked CFOs whether and to what extent their firms faced financial constraints—*i.e.*, limitations on the availability or increases in the cost of financing—during the crisis, and about the effects of those constraints on their firms' behavior. The survey results showed that during the crisis roughly one in five U.S. firms was substantially more constrained ("constrained firms") than others ("unconstrained firms"). *Id.* at 476. Constrained firms experienced various forms of constraint, including limited availability of credit (reported by 81% of CFOs at constrained firms), higher borrowing costs (reported by 59% of CFOs at constrained firms), and difficulties in originating or renewing a bank line of credit (reported by 55% of CFOs at constrained firms). *Id.* at 477. Unconstrained firms reported experiencing such constraints at substantially lower rates. *Id.*

The real effects of financial constraints during the crisis were dramatic: constrained firms suffered substantially greater reductions than unconstrained firms with regard to virtually every key business metric. *Id.* at 478.

As the following chart illustrates, on average constrained firms in the U.S. planned in 2009 to dramatically reduce employment (by 11%), technology spending (by 22%), capital investment (by 9%), marketing expenditures (by 32%), cash holdings (by 15%), and dividend payments (by 14%), whereas unconstrained firms planned, on average, significantly smaller cuts in each area:



Id. at 478, Figure 2; *see also* Tang, *supra*, at 332, Figure 2 (finding in the context of Moody's rating refinement that downgraded firms experienced substantial reductions in capital expenditures relative to upgraded firms). These reductions negatively affect the health and strength of constrained firms, with attendant consequences for employees and the economy at large.

Planned workforce reductions of nearly 11% by constrained firms have broader implications for the national economy, not least because, "in the context

of the current crisis . . . cuts in corporate sector employmer have contributed to further declines in residentia value and investment, which are at the root of the crisis." Campello et al., *supra*, at 471.

Further, the substantial reduction in capital expenditures by constrained firms during the crisis also is significant. More than half of CFOs at constrained firms reported a propensity to cancel investments in response to limits on access to external financing compared with 31% of unconstrained CFOs. *Id.* at 485. Firms with greater financial flexibility are more able to avoid financial distress in the face of negative shocks, and are more able to fund investment when profitable opportunities arise. *See* Andrea Gamba & Alexander Triantis, *The Value of Financial Flexibility*, 63 J. Fin. 2263, 2263 (2008) In contrast, when firms cannot absorb negative shocks and forgo or cancel planned investment opportunities, they reduce their prospects for growth. Indeed, it is widely recognized that "investment is necessary for growth." Emanuel Thornton Weiler, *The Economic System: An Analysis of the Flow of Economic Life* 693 (1952). That constrained firms burn through their cash holdings at much higher rates than unconstrained firms further diminishes their capacity for investment, because "firms with more cash on hand invest more." Jeremy C. Stein, *Agency, Information and Corporate Investment*, *in Handbook of the Economics of Finance* 111, 127 (2003).

At bottom, research shows that financial constraints—*i.e.*, limitations on the availability or increases in the cost of financing—are associated with underperformance by the constrained firm. In 2008, constrained firms reported profits at a substantially lower rate than unconstrained firms. *See* Campello

et al., *supra*, at 476, Table 3. Constrained firms also expected to grow at a slower pace than unconstrained firms; 67% of constrained firms reported expected growth exceeding 5% in 2009, whereas 78% of unconstrained firms expected to exceed that benchmark. *Id.* at 476.

Finally, financial constraints also are associated with firm failure. One recent study examined the impact of financial constraints on firms' failure rates in Europe, concluding that "financial constraints play a significant role in determining the probability of firm survival." Patrick Musso & Stefano Schiavo, *The Impact of Financial Constraints on Firm Survival and Growth*, 18 J. Evol. Econ. 135, 147 (2008).

* * *

In evaluating the D.C. Circuit's decision as it relates to a company's interest in "the market's assessment of [its] . . . credit worthiness," Pet. App. 13a, *amici* believe that recent research reflecting the real effects of financial constraints bears on the nature of the interest at stake and the importance of these issues. In order to operate—that is, to acquire, use and dispose of the things that firms own—firms need access to credit. Significant limitations on the availability of credit or increases in the cost of financing cause firms to suffer significant adverse real-world consequences. Constrained firms do not hire, spend, invest, or grow as they otherwise would.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that these issues are of national importance and merit the Court's consideration.

Respectfully submitted,

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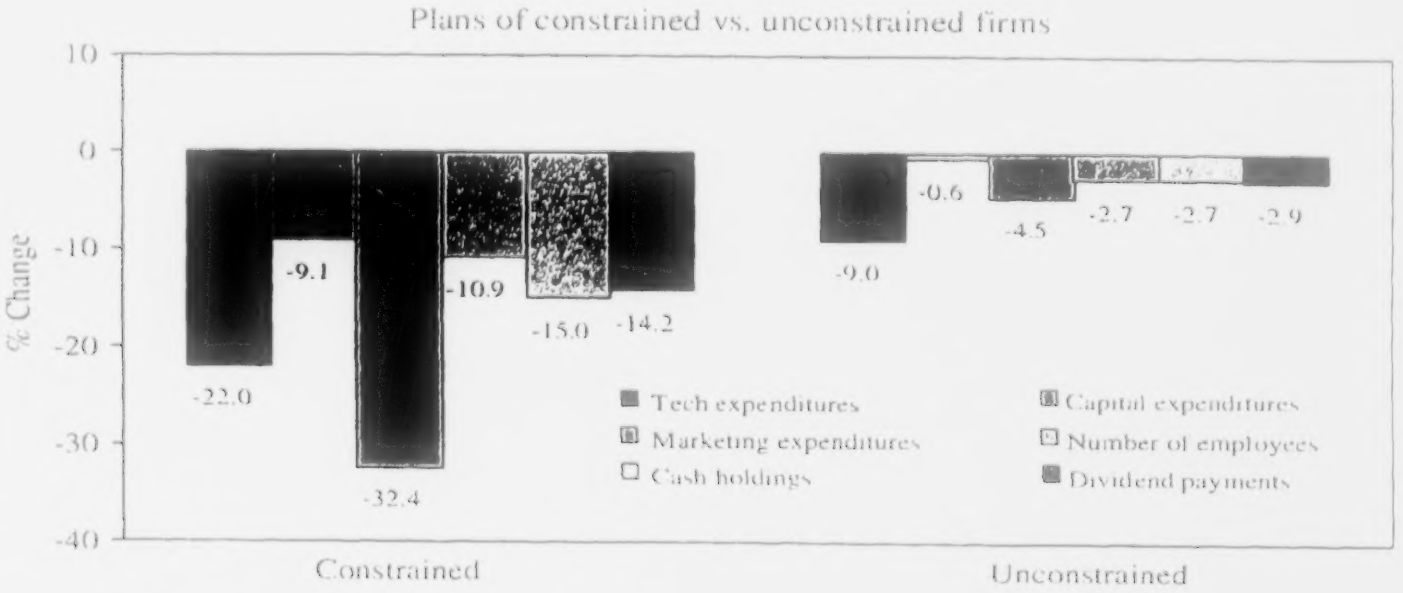

APPENDIX

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